Supreme Court, U.S.
FILED

(1)

No. 97 1149 JAN - 5 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA,

Petitioner,

vs.

MORAN TRADE CORPORATION OF DELAWARE, MORAN TOWING OF VIRGINIA, A DIVISION OF MORAN MID-ATLANTIC CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN R. CRUMPLER, JR.
KAUFMAN & CANOLES, P.C.
2000 Nations Bank Center
One Commercial Place
P.O. Box 3037
Norfolk, VA 23514
(757) 624-3103

PATRICK J. BONNER
Counsel of Record
FREEHILL, HOGAN & MAHAR
80 Pine Street
New York, NY 10005
(212) 425-1900

Attorneys for Petitioner

72734

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, inc.

A DIVISION OF COUNSEL PRESS

99pp

QUESTIONS PRESENTED FOR REVIEW

1. Is it permissible to imply federal preemption of state and common law claims into OPA 90, 33 U.S.C. § 2701, *et seq.* when the Act expressly provides reliable indicia of the Congressional intent with respect to state and common law claims?

2. Can state and common law remedies, when expressly reserved in one section of an Act, be restricted in other sections of the same Act based on a court's interpretation of Congressional intent?

3. Did Congress preempt state and common law remedies in any manner in OPA 90?

LIST OF PARTIES

The parties to the proceeding sought to be reviewed are Petitioner, National Shipping Company of Saudi Arabia (NSCSA); Respondents, Moran Mid-Atlantic Corporation, Moran Trade Corporation of Delaware, Moran Towing of Virginia, Inc., a division of Moran Mid-Atlantic Corporation. NSCSA has no parent company and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
A. District Court Jurisdiction	3
B. Procedural History	3
C. Background	4
Reasons for Granting the Writ	7
Conclusion	13

TABLE OF CITATIONS

Cases Cited:

American Dredging Co. v. Miller, 510 U.S. 443 (1994) 12, 13

Contents

	Page
Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973)	11
Berman Enterprises, Inc. v. Jorling, 793 F. Supp. 408 (E.D.N.Y.), *aff'd*, 3 F.3d 602 (2d Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994)	10
Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235 (11th Cir. 1995)	10
Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988)	12
Frederick E. Bouchard, Inc. v. United States, 583 F. Supp. 477 (D. Mass. 1984)	10
Gaspar v. United States, 460 F. Supp 656 (D. Mass. 1978)	10
Golnay Barge v. Shinoussa, 1991 A.M.C. 2930 (S.D. Tex. 1991)	10
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)	12
In re Ballard Shipping, 32 F.3d 623 (1st Cir. 1994)	11, 12
In re Odin Marine Corp., 96 Cv. 5438 (S.D.N.Y., August 7, 1997)	10
Intertanko v. Lowry, 947 F. Supp. 1484 (W.D. Wa. 1996)	12

Contents

	Page
Lewis v. Brunswick Corp., 97-288	13, 14
Montauk Oil Transp. Corp. v. Tug El Zorro Grande, 54 F.3d 111 (2d Cir. 1995)	10
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986)	12
Steuart Transp. Co. v. Allied Towing Corp., 596 F.2d 609 (4th Cir. 1979)	10
Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979)	10
United States v. Dixie Carriers, Inc. 736 F.2d 180 (5th Cir. 1984)	5
United States v. Hollywood Marine, Inc., 625 F.2d 524 (5th Cir.), *cert. denied*, 451 U.S. 994 (1980)	10
United States v. LeBeouf, 621 F.2d 787 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981)	10
United States v. M/V Big Sam, 681 F.2d 432 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983)	10
United States v. Rivera, 942 F. Supp. 732 (D.P.R. 1996), *rev'd*, 1997 Lexis 34186 (1st Cir. 1997)	10
United States v. T/B Arcadian 95, 714 F.2d 470 (5th Cir. 1983)	10

Contents

	Page
United States v. West of England Ship Owners Mut. Prot., 872 F.2d 1192 (5th Cir. 1989)	10
Yamaha Motor Corp. v. Calhoun, 116 S. Ct. 619 (1996)	12, 13

Statutes Cited:

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	3
28 U.S.C. § 1332	3
28 U.S.C. § 1333	3
33 U.S.C. § 2701, *et seq.*	i, 4, 5
33 U.S.C. § 2702(a)	2
33 U.S.C. § 2702(d)(1)(B)(i)	6
33 U.S.C. § 2702(d)(2)(A)	2
33 U.S.C .§ 2704	8
33 U.S.C. § 2704(a)	3, 5
33 U.S.C. § 2704(c)(2)	5
33 U.S.C. § 2713(a)	6

Contents

	Page
33 U.S.C. § 2714	6
33 U.S.C § 2718	5, 7, 8, 12
33 U.S.C.§ 2718(a)	3, 11
46 U.S.C. § 4301, *et seq.*	13
United States Constitution Cited:	
Article III	2
Other Authorities Cited:	
S. Rep. No. 99, 101st Cong., 2d Sess., *reprinted in* 1990 U.S.C.C.N. 751	9
Gonyer, *Six Years Before the Mast,* 9 U. San Fran. Mar. L.J. 105 (1996)	9
McCurdy, *OPA Overview & Relationship to Other Laws,* 5 U.S.F Mar. L.J. 439 (1993)	8
Mitchell, *Preservation of State and Federal Authority under the Oil Pollution Act of 1990,* 21 Envtl. L. 237 (1991)	5
Morgan, *The Oil Pollution Act of 1990,* 6 Fordham Envtl. L.J. 1 (1995)	8
Olafson, *Stricken Barge Spurting Oil off Bolivar,* Houston Chronicle, March 19, 1996	10

Contents

Page

Olafson, *Gooey Mess Spreads Far, Fast,* Houston Chronicle, March 20, 1996 10

Olafson, *Congealed Oil Spares Galveston,* Houston Chronicle, March 21, 1996 10

Rodriquez & Jaffe, *The Oil Pollution Act of 1990,* 15 Tulane Mar. L.J.1 (1990) 8

Swanson, *Federalism, the Admiralty and Oil Spills,* 27 J. Mar. L. & Comm. 379 (1996) 8

Wyatt, *Navigating the Limits of State Spill Regulations,* 8 U.S.F. Mar. L.J. 1 (1995) 8

APPENDIX

Appendix A — Opinion Of The United States Court Of Appeals For The Fourth Circuit Decided September 9, 1997 ..... 1a

Appendix B — Judgment And Opinion Of The United States District Court For The Eastern District Of Virginia, Norfolk Division Filed April 25, 1996 ..... 12a

Appendix C — Final Order Of The United States District Court For The Eastern District Of Virginia, Norfolk Division Dated May 29, 1996 ..... 56a

Contents

Page

Appendix D — Order Of The United States District Court For The Eastern District Of Virginia, Norfolk Division Filed September 18, 1995 ..... 60a

Appendix E — Order Of The United States District Court For The Eastern District Of Virginia, Norfolk Division Filed August 14, 1995 ..... 62a

Appendix F — Denial Of Petition For Rehearing Of The United States Court Of Appeals For The Fourth Circuit Filed October 6, 1997 ..... 73a

Petitioner, National Shipping Company of Saudi Arabia (NSCSA) respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals for which review is sought (Appendix, 1a) is unreported. The Opinion of the District Court following the trial is reported at 924 F. Supp. 1436; 1996 A.M.C. 2604 (Appendix, 12a). The Order denying the motion to amend the judgment in the District Court is unreported (Appendix, 56a). The earlier District Court Order denying reconsideration of the decision dismissing the state statutory claim is also unreported (Appendix, 60a), as is the earlier District Court decision dismissing the state statutory claim (Appendix, 62a). The Order denying the Petition for a Rehearing in the Court of Appeals (Appendix, 73a) is unreported.

STATEMENT OF JURISDICTION

Petitioners seek review of an Opinion entered on September 9, 1997. The Order denying the Petition for Rehearing of that Opinion was entered on October 6, 1997. This Petition for Writ of Certiorari is filed within ninety days of the entry of the October 6, 1997 Order denying the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE III OF THE CONSTITUTION

Section 2, Clause 1 of the United States Constitution provides, in relevant part that:

> The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.

OIL POLLUTION ACT OF 1990 PROVISIONS

Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(a) provides in relevant part:

> (a) In General. — notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in Subsection (b) that result from such incident.

Section 1002(d)(2)(A) of OPA, 33 U.S.C. § 2702(d)(2)(A) states in pertinent part:

> Owner or operator of vessel or facility — If the act or omission of a third party that causes an incident occurs in connection with the vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in Section 1004 as applied with respect to the vessel or facility.

Section 1004(a) of OPA, 33 U.S.C. § 2704(a) states in relevant part:

> General Rule — Except as otherwise provided in this section, the total of the liability of a responsible party under section 1002 and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed — . . .
>
> (2) for any other vessel, $600 per gross ton or $500,000, whichever is greater . . .

Section 1018 (a) of OPA, 33 U.S.C.§ 2718(a) provides in pertinent part:

> Preservation of State Authorities; Solid Waste Disposal Act. — Nothing in this Act . . . shall — . . .
>
> (2) affect or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et. seq.) or State law, including common Law.

STATEMENT OF THE CASE

A. District Court Jurisdiction

Jurisdiction of the United States District Court, Eastern District of Virginia was based on 28 U.S.C. §§ 1331, 1332, and 1333.

B. Procedural History

On December 1, 1993, the tug HARRIET MORAN, owned

by respondent Moran Trade Corporation of Delaware collided with the M/V SAUDI DIRIYAH, a vessel owned by Petitioner National Shipping Company of Saudi Arabia (NSCSA). As a result of the collision, about 9,000 gallons of fuel oil were spilled into the Elizabeth River. NSCSA took responsibility for the spill, cleaned it up and settled most of the claims asserted by third parties. In March, 1995, NSCSA filed a complaint, later amended, against Respondents, arguing that the collision was caused by Respondents' negligence and asserting four different theories of liability: (1) General Maritime Law; (2) Virginia's State Water Control Law; (3) Virginia Common Law; and (4) The Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq.* (OPA).

On August 14, 1995, the District Court entered an Order dismissing Count II of the complaint which sought to recover the response costs and third party settlement claims pursuant to Virginia State Water Control Law. On September 18, 1995, the Court denied the Petitioner's motion for reconsideration or clarification of the aforementioned Order.

The case was tried non-jury in January, 1996 and the Court issued an Order dated April 25, 1996 finding Respondents Moran solely responsible for the collision that caused the oil spill but limiting Moran's liability to $500,000 pursuant to OPA 90. The Court found that Petitioner NSCSA's liability to others arose solely under OPA 90 and accordingly NSCSA was limited to claiming under that law and was preempted from claiming under state law or common law. The Circuit Court affirmed this decision.

C. Background

As former Senate Majority Leader George Mitchell has explained, efforts to enact a comprehensive Federal Oil Pollution Law had been stymied for many years due to a disagreement

about whether such a law should preempt state law regarding oil spills.[1]

In 1989 and early 1990 there were a number of major spills around the country which led to the passage of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701, *et seq.* Although the Act sets forth a comprehensive Federal liability scheme regarding discharges of oil onto the navigable waters, it specifically reserves the right to claim under state law and common law and it leaves the individual states free to enact such pollution liability laws as they deem necessary.[2] This is one of the main and most controversial features of the Act.[3]

A second chord running through OPA is the notion that the party responsible for the spilling vessel should cleanup the oil and pay all claims in the first instance. Thus, the amounts paid by the responsible party to remove the oil are credited to its Limitation Fund.[4] 33 U.S.C. § 2704(a). If a responsible party fails to cooperate and assist in the oil removal activities after being requested to do so, the responsible party loses it's right to limit liability. 33 U.S.C. § 2704(c)(2). The Coast Guard is required to officially notify the party responsible for the oil spill of its designation as the source of the spill. The responsible party has five days to deny this designation and if there is no denial, the responsible party must begin advertising the procedures to

---

1. Mitchell, *Preservation of State and Federal Authority under the Oil Pollution Act of 1990*, 21 Envtl. L. 237 (1991).

2. 33 U.S.C. § 2718

3. *See* Mitchell, *supra*, n.1.

4. This was not allowed under the Federal Water Pollution Control Act, *United States v. Dixie Carriers, Inc.*, 736 F.2d 180, 183 (5th Cir. 1984).

submit claims. 33 U.S.C. § 2714. All claims must be submitted to the responsible party in the first instance. 33 U.S.C. § 2713(a). Even if it is the position of the responsible party that the spill was caused solely by a third party, the responsible party must still pay the removal costs in the first instance. 33 U.S.C. § 2702(d)(1)(B)(i).[5] Thus, there is an overriding intent in OPA that the responsible party for the vessel spilling oil should immediately begin to cleanup the oil and pay claims.

---

5. At the time the law was enacted, the sponsors left no doubt that the intent was to force the spilling vessel to cleanup the oil and pay claims immediately:

> Our goal is to make certain that, when a spill occurs, the polluter — not the taxpayer — will pay; and to make certain that fishermen and property owners and hotel operators and others hurt by a spill will be compensated — not 7 years from now, not after lawyers have taken half or three-quarters of the money, but quickly and fairly. 136 Cong. Rec. H6931 (daily ed. August 3, 1990) (statement of Rep. Studds)

> The conference agreement is a strong statement that we should never again be caught so unprepared. It tries to ensure that industry and government are prepared for oil spills, and that they respond quickly and effectively to contain them and minimize damage.

> To make sure that industry does clean up its spills, the agreement requires ship and facility owners to prepare response plans that ensure to the maximum extent practicable sufficient private resources to deal with a worst-case spill. 136 Cong. Rec. S11537 (daily ed. August 2, 1990) (statement of Sen. Baucus)

REASONS FOR GRANTING THE WRIT

The Opinion in *National Shipping* ignores these two overriding themes in OPA and creates a dilemma for owners and admiralty lawyers representing vessels which spill oil. If those responsible for the vessel spilling oil accept responsibility pursuant to OPA, under the reasoning of the court below, the owner could be waiving any state or common law remedies for contribution or indemnity. This creates an incentive to try to get the local authorities to see that "*State Law* [is] . . . *imposed to force* [the owner] *to cleanup the spill or to compensate its victims.*"[6] This would be the only safe way to avoid preemption and preserve the indemnity and contribution claims. One possible way to achieve this goal would be to take no action until ordered to do so by the state or local authorities. This is contrary to OPA but is unfortunately one of the few options available under the lower court's decision.

The lower court's interpretation of 33 U.S.C § 2718 is the root of the problem. On its face, this section is not confusing. It reads in relevant part as follows:

> Nothing in this Act . . . shall
>
> > (2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State Law, including common Law.

This section was the basis for Petitioner's claim that it had indemnity and contribution actions under Virginia State and common law regardless of any limitation contained in OPA or anything else in the Act. This is the plain meaning of the words

---

6. *National Shipping*, Appendix, 10a.

of § 2718 and a view largely shared by the commentators on OPA.[7]

Although the Respondents have obligations and liabilities for contribution and indemnity under state and common law, the lower court found that OPA shielded or protected the Respondents from these obligations and liabilities. The court made the implied finding that the Petitioner was preempted from asserting these state and common law claims due to the limitation amounts in OPA. The court held that state and common law could be used in contribution and indemnity cases only if the underlying obligation arose exclusively under state or common law. Thus, the Petitioner was precluded by OPA from bringing a state or common law action because the liability for the oil spill arose "solely" under OPA.

The analysis in *National Shipping* is further complicated by the court's interpretation of 33 U.S.C. § 2704, the section dealing with the effect of a vessel's Limitation Fund. Although

---

7. *See, e.g.*, Rodriquez & Jaffe, *The Oil Pollution Act of 1990*, 15 Tulane Mar. L.J. 1, 18 (1990) ("additional state liabilities are not subject to limitation either under the Act itself, or pursuant to the Limitation Act."); Morgan, *The Oil Pollution Act of 1990*, 6 Fordham Envtl. L.J. 1, 6 (1995) ("Thus, OPA's liability limits provide no protection for responsible parties sued under State Law"); Swanson, *Federalism, the Admiralty and Oil Spills*, 27 J. Mar. L. & Comm. 379, 415 (1996) ("Under OPA and case law, each state is apparently allowed to fashion its own liability rules beyond those established by the Federal Law. These state statues may be enforced even when they contravene the general Maritime Law."); Wyatt, *Navigating the Limits of State Spill Regulations*, 8 U.S.F. Mar. L.J. 1, 12 (1995) ("OPA permits supplementation of its liability scheme with 'any additional liability or requirements,' which seems to permit the states not only to enlarge liabilities but also expand the categories of responsible parties to include all participants in the risk-creating activity") (footnotes omitted); McCurdy, *OPA Overview & Relationship to Other Laws*, 5 U.S.F Mar. L.J. 439-441 (1993).

difficult to follow, it appears that the key figure is not the Limitation Fund of the vessel at fault for the spill but the Limitation Fund of the blameless vessel. Under this reasoning, if the M/V SAUDI DIRIYAH had an OPA Limitation Fund of $500,000, under the exact same facts, it would be entitled to recover in full from the defendants. Using this analysis, it is the blameless vessel's tonnage that is the determining factor on whether or not there is preemption of state and common law. If the blameless vessel has a low limitation figure under OPA, there is no preemption and a party may claim under state and common law. However, as in the present case, if the blameless ship owner's Limitation Fund is greater than the cost of the cleanup, the owner cannot use state or common law to claim against the vessel which caused the oil spill.[8]

It is important that the confusion in the law engendered by *National Shipping* be cleared up as soon as possible. In 1988, the country imported 6 million barrels of oil per day and there were about 3,800 port calls by oil tankers.[9] Either these tankers used tugs to assist in docking or anchored and then off loaded the oil to barges propelled by tugs. Most oil spills involve more than one vessel and the uncertainty about when a party can use

---

8. One commentator, who specializes in marine pollution cases, thought the lower court used an economic rationale for it's decision and then made a determination that the larger vessel derived a greater economic benefit from the operation. Gonyer, *Six Years Before the Mast*, 9 U. San Fran. Mar. L.J. 105, 120-122 (1996). If this is the underpinning for the decision, it is certainly contrary to the plain meaning of OPA and the Congressional intent behind the law.

9. S. Rep. No. 99 at 3, 101st Cong., 2d Sess., *reprinted in* 1990 U.S.C.C.N. 751. While spills from tankers or barges pose the greatest environmental risk, in the present case, the M/V Saudi Diriyah was not a tanker and yet the clean up costs were far higher than the tug's Limitation Fund. There are hundreds of similar tug assisted movements to the one in this case each week throughout the country.

state law might delay a cleanup and aggravate environmental damages after a spill. Spills involving more than one vessel generate a substantial amount of litigation[10]. Indeed, the four largest spills since the enactment of OPA have involved tugs and barges[11]. The barges are larger and have higher Limitation Funds than the tugs. The tugs are manned, provide the propulsive force, and are usually to blame for the collision, grounding, or other casualty that causes the oil spill. Since the oil would come from the barge or tanker, the barge or tanker owner would be the responsible party and would have a claim over against the tug. The tug's Limitation Fund under OPA is much smaller and the barge or tanker owner will realize that even if it is blameless, it might not recover the cost of the clean up due to the OPA

---

10. *See, e.g., United States v. West of England Ship Owners Mut. Prot.*, 872 F.2d 1192 (5th Cir. 1989); *United States v. Hollywood Marine, Inc.*, 625 F.2d 524 (5th Cir.), *cert. denied*, 451 U.S. 994 (1980); *United States v. LeBeouf*, 621 F.2d 787 (5th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); *Frederick E. Bouchard, Inc. v. United States*, 583 F. Supp. 477 (D. Mass 1984); *United States v. M/V Big Sam*, 681 F.2d 432 (5th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983); *United States v. T/B Arcadian 95*, 714 F.2d 470 (5th Cir. 1983); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979); *Montauk Oil Transp. Corp. v. Tug El Zorro Grande*, 54 F.3d 111 (2d Cir. 1995); *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979); *Gaspar v. United States*, 460 F. Supp 656 (D. Mass. 1978); *Golnay Barge v. Shinoussa*, 1991 A.M.C. 2930 (S.D. Tex. 1991).

11. TAMPA BAY SPILL — *Boca Ciega Hotel, Inc. v. Bouchard Transp. Co.*, 51 F.3d 235 (11th Cir. 1995); PUERTO RICO SPILL — *United States v. Rivera*, 942 F. Supp 732 (D.P.R. 1996), *rev'd*, 1997 Lexis 34186 (1st Cir. 1997) (*en banc*); RHODE ISLAND SPILL — *In re Odin Marine Corp.* 96 CV. 5438 (S.D.N.Y.) (decision of Judge Stein August 7, 1997); TEXAS SPILL — Olafson, *Stricken Barge Spurting Oil off Bolivar*, Houston Chronicle, March 19, 1996 at 11; Olafson, *Gooey Mess Spreads Far, Fast*, Houston Chronicle, March 20, 1996 at 23; Olafson, *Congealed Oil Spares Galveston*, Houston Chronicle, March 21, 1996 at 33.

limitation amount for the tug unless it has the grounds to assert a claim under state or common law. This is the lesson that *National Shipping* sends out to vessel owners and those who practice marine pollution law.

There is a fundamental conflict between the holding in *National Shipping* and the First Circuit Court's decision in *In re Ballard Shipping*, 32 F.3d 623 (1st Cir. 1994). In *Ballard*, the court held that

> an injured party may have claims arising from a single accident both under federal maritime law and under state law, whether legislation or common law.

Ballard, supra at 626. Even though the First Circuit Court in *Ballard* affirmed the dismissal of the federal claims, it allowed state law claims arising from the same incident to go forward. It relied in part on § 2718(a) of OPA which allows additional state law liability. The spill in *Ballard* occurred before OPA was enacted but the court found that the non-retroactivity of OPA was irrelevant. In contrast, the Fourth Circuit Court in *National Shipping* made a determination the Petitioner's liability arose solely under OPA and held that since this liability arose under OPA 90, the Petitioner could not claim under state or common law due to the preemption in OPA 90. In other words, the Petitioner could have only one claim up to its Limitation Fund and that claim was under OPA.

The holding in *National Shipping* is also a clear departure from the recent trend of Supreme Court and lower court cases involving preemption of state and common law in the pollution area. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), this Court sustained a Florida statue that imposed no fault liability on vessel owners and operators for damages caused by oil spills in territorial waters and rejected a maritime

law preemption challenge. Similarly, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court held that state air pollution laws were a classic example of police power and that the state could act in such areas of interstate commerce and maritime activity concurrent with the federal government. Lower courts have followed this trend. Thus, in *Ballard, supra*, the court held that the Rhode Island State Law was not preempted by applicable Federal Law. OPA 90 did not apply to this case although the court left little doubt that OPA 90 compelled it to allow the claims under Rhode Island Law. In a case interpreting Section 2718 of OPA, a New York court held that a New York pollution statute was not preempted by OPA. *Berman Enterprises, Inc. v. Jorling*, 793 F. Supp. 408, 414-16 (E.D.N.Y.), *aff'd*, 3 F.3d 602 (2d Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994). In another case interpreting Section 2718 of OPA, the District Court in Seattle held that the OPA 90 non preemption language applied to Washington State regulations which governed tanker operations and other maritime subjects. *Intertanko v. Lowry*, 947 F. Supp 1484 (W.D. Wa. 1996).

A large part of this Court's admiralty docket over the past few years has dealt with the conflict between State Law and Federal Admiralty Law; both statutory and judge made Admiralty Law. Apparently, there remains confusion in some courts about when State Law is preempted by Federal Law. In certain admiralty cases, this Court has made it clear that there is no preemption. *See, e.g., Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619 (1996); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Chick Kam Choo v. Exxon Corp.* 486 U.S. 140 (1988). In other admiralty cases, the Court has held that State Law cannot be used in certain admiralty actions. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986). This Court has recognized that this choice of law puzzle is very difficult and

> it would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.

American Dredging, *supra*. at 452. Justice Ginsburg repeated Justice Scalia's quote in *Yamaha, supra* and then wrote "we attempt no grand synthesis or reconciliation of our precedent today . . ." and left many questions for another day. *Yamaha*, *supra* at 626 n.8. That day has arrived for this area of the law. Although OPA 90 and prior Supreme Court cases dealing with preemption in pollution cases may seem to draw a clear, bright line on the choice of law issue, this line is not discernible in *National Shipping* and the holding in *National Shipping* will spawn other cases which will blur the line even further.

This Court has recognized the importance of the preemption issue and the need for clear guidelines about when Federal law will preempt state and common law in statutory claims. The Court has granted certiorari in *Lewis v. Brunswick Corp.*, 97-288. The questions presented in that case deal with the implied preemption of state common law claims under the Boat Safety Act, 46 U.S.C. § 4301, *et seq.* The decision in *National Shipping* deals with the implied preemption of state and common law claims under OPA and raises many of the same issues as *Lewis* in the maritime oil pollution area. The main difference is that in the maritime pollution area, the unsettled law could cause a delay in cleaning up a large spill and could aggravate environmental damage. This uncertainty should be resolved prior to the next large oil spill which history shows us, is sure to occur.

CONCLUSION

1. For the forgoing reasons, this Court should grant the petition and exercise its jurisdiction to resolve the confusion

about the preemption of state and common law in a maritime oil spill case.

2. In the alternative, Petitioner prays for a summary reversal of the decision below.

3. In the alternative, Petitioner requests that certiorari be granted and *National Shipping* be identified as a companion case to *Lewis v. Brunswick Corp.*, 97-288 because of the similarity of issues involving the implied or explicit preemption of state law by federal statutes dealing with maritime matters.

4. In the alternative, Petitioner prays that the Court hold the case without action until *Lewis v. Brunswick Corp.* is decided and then either grant certiorari to consider any issues not decided in that case or grant certiorari and vacate and remand in light of the decision in *Lewis v. Brunswick Corp.*

Respectfully submitted,

PATRICK J. BONNER
Counsel of Record
FREEHILL, HOGAN & MAHAR
80 Pine Street
New York, NY 10005
(212) 425-1900

JOHN R. CRUMPLER, JR.
KAUFMAN & CANOLES, P.C.
2000 Nations Bank Center
One Commercial Place
P.O. Box 3037
Norfolk, VA 23514
(757) 624-3103

Attorneys for Petitioner

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED SEPTEMBER 9, 1997

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-1741

National Shipping Company of Saudi Arabia,

Plaintiff-Appellant,

v.

Moran Trade Corporation of Delaware, in personam; Moran Towing of Virginia, Incorporated, a division of Moran Mid-Atlantic Corporation,

Defendants-Appellees.

No. 96-1824

National Shipping Company of Saudi Arabia,

Plaintiff-Appellee,

v.

Moran Trade Corporation of Delaware, in personam; Moran Towing of Virginia, Incorporated, a division of Moran Mid-Atlantic Corporation,

Defendants-Appellants.

Appendix A

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca B. Smith, District Judge; J. Calvitt Clarke, Jr.,
Senior District Judge; Tommy E. Miller, Magistrate Judge.
(CA-95-258-2)

Argued: June 3, 1997

Decided: September 9, 1997

Before HALL and MICHAEL, Circuit Judges, and TILLEY,
United States District Judge for the Middle District of
North Carolina, sitting by designation.

* * *

OPINION

PER CURIAM:

Plaintiff National Shipping Co. of Saudi Arabia (NSCSA) brought an action against defendants Moran Trade Corporation of Delaware, Moran Towing of Virginia, Moran Mid-Atlantic Corporation, and the M/V HARRIET MORAN (collectively "Moran") in an effort to recoup its expenses in the cleanup of an oil spill on the Elizabeth River outside Norfolk, Virginia. The district court determined that Moran was negligent and that this negligence was the sole cause of the spill. The court therefore found Moran liable for the costs of the cleanup under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701 *et seq.* However, the court limited Moran's liability under OPA to $500,000 (roughly half the cost of the cleanup). Finally, the court held that NSCSA could not recoup the excess costs through

exceptions to the liability cap or through state law claims. NSCSA appeals from this limitation on Moran's liability, and Moran cross-appeals from the court's determination that it was negligent. Finding no error, we affirm.

I.

This case involves an accident between a tugboat and a cargo vessel. The cargo vessel SAUDI DIRIYAH, owned by NSCSA, was docked at Norfolk International Terminals on the Elizabeth River. On the night of December 1, 1993, the vessel was to undock and move upstream to different docks. NSCSA contracted with Moran to provide two tugboats to assist in the move; it also contracted with docking pilot John Morey to oversee the move.

After breasting away from the pier, the SAUDI DIRIYAH made a series of turns to maneuver up the river. To make these turns, the vessel used bow and stern thrusters that were mounted on the side. At some point during the turn, William Lusk, the captain of the tugboat HARRIET MORAN, brought the tug in on the SAUDI DIRIYAH's port quarter to assist with the turn into the channel. However, when the boats made contact, one of the tug's quarter bitts struck the SAUDI DIRIYAH's hull and opened a gash in the vessel's fuel oil tank. Oil began spilling into the river and continued to flow for the next two hours as the vessel moved upstream and docked.

Approximately 9,000 gallons of oil leaked into the river from the spill. The cleanup was directed by the United States Coast Guard, which designated NSCSA as the "responsible party" under the OPA. NSCSA thus arranged and paid for all of the cleanup. NSCSA paid roughly $870,000 to those engaged

to remove the oil, and it also paid $106,806.12 to settle claims of those whose property was damaged by the spill. In addition, the Coast Guard and the United States Navy incurred about $300,000 in costs, which these agencies are seeking to recover from NSCSA.

NSCSA brought an action in the United States District Court for the Eastern District of Virginia, claiming that Moran's negligence was the cause of the spill. NSCSA brought claims under OPA, the Virginia Water Control Law, and state common law. The Water Control Law claim was dismissed before trial. After a bench trial the district court found that Moran was negligent and that this negligence was the sole cause of the accident. The court therefore granted relief under OPA, but it determined that OPA § 1004(a)(2) capped Moran's damages at $500,000. The court also concluded that none of the exceptions to this cap applied and that NSCSA could not circumvent the cap through its state law claims. However, under general maritime law the court awarded NSCSA $3,250 for the lost fuel and $16,050 for the damage to the hull. The court also awarded prejudgment interest. *See National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436 (E.D. Va. 1996).

NSCSA appeals from the district court's denial of its claims for relief under state law and from the finding that none of the exceptions to OPA's damages cap applies. Moran appeals from the district court's conclusion that Moran's negligence caused the spill.

II.

We turn first to Moran's cross-appeal. Moran contends that

the district court erred in holding it liable under OPA § 1002 for the cleanup of the oil spill. Section 1002(a) establishes that the "responsible party" will be liable for the removal costs and damages of a spill. *See* 33 U.S.C. § 2702(a). Under § 1001(32)(A) the responsible party is defined as the owner or operator of the vessel which actually discharges the oil. Since NSCSA is the "responsible party" with regard to she SAUDI DIRIYAH, NSCSA was liable for the cleanup. Under § 1002(d)(1), however, the responsible party can reassign liability to a third party if the responsible party "establishes that [the] discharge . . . and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties." 33 U.S.C. § 2702(d)(1). The district court found that Lusk, who as captain of the tug was serving as Moran's agent, acted negligently during the maneuver; the court further found that this negligence was the sole cause of the accident. Therefore, the court concluded that Moran was liable for the costs of the cleanup under § 1002(d)(1). We review the district court's factual findings only for clear error. *See Waters v. Gaston County*, 57 F.3d 422, 425 (4th Cir. 1995).

Moran contends that the accident was caused not by its negligence but rather by the negligence of Morey, the docking pilot hired by NSCSA. According to Moran, Morey failed to alert Lusk that the SAUDI DIRIYAH was changing the direction of its turn, and this failure to alert misdirected Lusk, causing him to approach the SAUDI DIRIYAH at the wrong spot. The district court, however, found that Lusk had failed to exercise proper control over his vessel during the course of the maneuver. *See NSCSA*, 924 F. Supp. at 1452. Having reviewed the evidence and the district court's findings, we do not believe that the district court clearly erred in finding that Moran was negligent.

III.

We next examine NSCSA's contentions that the district court erred in limiting Moran's liability under OPA's damage cap. Section 1002(d)(2)(A) of OPA states that "[i]f the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 2704 of the title as applied with respect to the vessel or facility." 33 U.S.C. § 2702(d)(2)(A). Section 1004(a)(2) puts the damages cap for any vessel other than a tank vessel at "$600 per gross ton or $500,000, whichever is greater." 33 U.S.C. § 2704(a)(2). Since the tugboat weighed only 252 gross tons, the district court limited Moran's liability under OPA to $500,000. *See NSCSA*, 924 F. Supp. at 1447. NSCSA attempts to get around this cap in two ways: it argues (a) that OPA's exceptions to the cap apply and (b) that it can recover the excess amount through state law claims under the Virginia Water Control Law and state common law. We take these arguments in turn.

A.

A party's liability may exceed the damages cap in OPA § 1004(a) if it falls into one of the exceptions in § 1004(c). The cap does not apply if the party committed "gross negligence or willful misconduct" or "violat[ed] . . . an applicable Federal Safety, construction, or operating regulation." 33 U.S.C. § 2704(c)(1). NSCSA contends that Moran, through its agent Lusk, violated one of the applicable federal safety regulations, namely, the Inland Navigational Rule. That rule provides:

> Every vessel shall at all times maintain a proper look-

> out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

33 U.S.C. § 2005. On the night of the accident, Lusk was acting as his own lookout. NSCSA contends that the absence of an additional designated lookout violated § 2005. Whether a special lookout was necessary is a question of fact which we review for clear error. *See C.G. Willis, Inc. v. The Spica*, 6 F.3d 193, 196, 197-98 (4th Cir. 1993).

The district court made the following findings of fact in determining the lack of need for a separate lookout:

> On the night of December 1, 1993, the sky was clear and calm. . . . [Captain Lusk] testified that he had an almost complete view of his surroundings through the windows of his wheelhouse. The HARRIET MORAN was laying a short distance off the port quarter of M/V SAUDI DIRIYAH. Captain Lusk testified that he had the best possible view of the ship from the wheelhouse. It does not appear that a separate lookout would have been of much assistance to the Captain.

NSCSA, 924 F. Supp. at 1451. These findings of fact are not clearly erroneous.[1]

---

1. NSCSA argues that Lusk admitted the need for a lookout during his deposition. When asked "Did you have a lookout posted?", Lusk responded that "[t]he engineer at the time of the undocking would have been my lookout." J.A. 115. During his trial testimony, however, Lusk

(Cont'd)

Appendix A

B.

NSCSA also claims that it can avoid OPA's damages cap by bringing claims under the Virginia Water Control Act and state common law. The Water Control Act provides that "[a]ny person discharging or causing or permitting a discharge of oil into or upon state water . . . shall be liable to [a]ny person for injury or damage to person or property, real or personal, loss of income, loss of the means of producing income, or loss of the use of the damaged property for recreational, commercial, industrial, agricultural or other reasonable uses, cause by such discharge." Va. Code. Ann. § 62.1-44.34:18(C)(4). NSCSA claims that this section enables it to recover its response costs under OPA as property damage or economic losses. NSCSA also seeks to bring Virginia common law indemnity and subrogation claims in order to collect its OPA expenses. In essence, NSCSA wants to use state law to collect the costs that it incurred as the OPA "responsible party" in excess of the $500,000 liability cap.

We conclude, however, that OPA prevents NSCSA from using state law to collect damages under OPA that exceed OPA's liability cap. OPA § 1004(a) specifically provides:

Except as otherwise provided in this section, the total

(Cont'd)
explained that the engineer "would have been [the lookout], if I inquired of him, requested him to be a lookout." J.A 90. We do not interpret Lusk's deposition testimony as an admission of the need for a separate lookout.

NSCSA also contends that even if Lusk could have served as an adequate lookout on his own, he failed to do so on the night of the accident. However, NSCSA fails to present any evidence that would warrant such a conclusion.

> of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed [the limitations set forth therein].

33 U.S.C. § 2704(a) (emphasis added). NSCSA is liable for the costs of the spill solely under OPA § 1002, and Moran is liable for those costs solely under § 1002. Thus, the total of Moran's exposure under OPA cannot exceed $500,000.[2] The only exceptions to this cap are those set forth in § 1004 itself.

NSCSA claims that OPA does not limit NSCSA's ability to collect its excess liability under OPA through state law claims. It cites OPA § 1018(a)(2), which states that "[n]othing in this chapter . . . shall . . . affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law." 33 U.S.C. § 2718(a)(2). NSCSA argues that this section allows it to bring state law claims to recoup its expenses. We disagree. NSCSA reads § 1018(a)(2) too broadly; that section only protects the rights of parties to bring additional claims based on liability that accrues under state law. If NSCSA had itself been damaged by the oil, or if it had been successfully sued by others under state law for damages relating to the spill, then the OPA liability restrictions would not apply.[3] And in this case, NSCSA was not

---

2. As we noted above, under § 1002(d)(2) Moran is treated as a "responsible party" for purpose of the liability cap.

3. The district court provided an example of such a case:

> Consider, for example, a case where an oil spill causes one

(Cont'd)

precluded by OPA from bringing a general maritime claim for the loss of fuel and the damage to the SAUDI DIRIYAH's hull. As the district court pointed out, however, "[s]tate law was never imposed to force NSCSA to cleanup the spill or to compensate its victims." *NSCSA*, 924 F. Supp. at 1449. Instead, "NSCSA's liability derived exclusively from OPA." *Id.*

If a responsible party could recoup its OPA liability costs through state law claims as well as through OPA, the cap imposed by OPA § 1004(a) would be rendered meaningless. Congress clearly intended for the cap to apply in situations like this one, since it established that "the liability of the third party shall be subject to the limits provided in section 2704 of the title." 33 U.S.C. § 2702(d)(2)(A). Under OPA's limitations on liability, smaller vessels are subject to lesser liability. Even if

---

(Cont'd)

> million dollars of damage, but the responsible party's liability under OPA is limited to $500,000. If the spill occurred in Virginia, the responsible party may have to pay for the full cost of the spill despite the liability limitation contained in OPA because a person's liability under Virginia's State Water Control Law may be higher than its liability under OPA. . . . If the spill was caused by the negligence of a third party, as it was in this case, it is reasonable to assume that the responsible party may: (1) sue the third party for contribution under section 2709 of OPA; and (2) be subrogated to the rights of the state and of other claimants under the State Water Control Law. In this way, the responsible party, whose ultimate liability was not restrained by OPA, could recover the full cost of the spill from the third party despite any liability limitation the third party might enjoy under OPA.

NSCSA, 924 F. Supp. at 1449.

we disagreed with this policy judgement, we are constrained by the text of the statute.

Because NSCSA seeks to recover costs imposed solely because of its liability under OPA, "the total of the liability [imposed on Moran] under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed" OPA limits — for Moran, $500,000.[4]

IV.

Based on the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

4. Because we affirm the limitation of Moran's OPA liabilities to $500,000, we need not discuss NSCSA's argument that the district court should have included the expenses incurred by Turnaboat Services Ltd. as part of NSCSA's expenses under OPA.

APPENDIX B — JUDGMENT AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION FILED APRIL 25, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CASE NUMBER: 2:95cv258

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA (NSCSA),

Plaintiff,

V.

MORAN TRADE CORPORATION OF DELAWARE, in personam, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff recover of the defendants the sum of $519,300 plus costs and interest at the rate of 8.25% from March 17, 1995, until the date of judgment, with interest thereon at the rate of 5.46 per cent as provided by law;

Appendix B

IT IS FURTHER ORDERED AND ADJUDGED that judgment is entered in favor of plaintiff on the counterclaim filed by Moran Towing of Virginia, Inc. and on defendants' Motion for Sanctions.

April 25, 1996
Date

NORMAN H. MEYER, JR.
Clerk

s/ Delores S. Mason
Delores S. Mason
(By) Deputy Clerk

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ACTION NO. 2:95cv258

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA (NSCSA),

Plaintiff,

v.

MORAN MID-ATLANTIC CORPORATION, *in personam*, MORAN TRADE CORPORATION OF DELAWARE, *in personam*, MORAN TOWING OF VIRGINIA, INC., a division of MORAN MID-ATLANTIC CORPORATION, *in personam*, and M/V HARRIET MORAN, her engines, tackle, apparel, etc., *in rem*,

Defendants.

OPINION

This controversy began on December 1, 1993, when the HARRIET MORAN, a tug owned by Defendant Moran Trade Corporation of Delaware and operated by Defendant Moran Towing of Virginia (Defendants referred to collectively as "Moran"),[1] collided with the M/V SAUDI DIRIYAH, a vessel owned and operated by Plaintiff National Shipping Company of Saudi Arabia ("NSCSA"). As a result of the collision,

---

1. NSCSA did not effect proper service on the HARRIET MORAN. It apparently has abandoned its *in rem* claim against the vessel.

approximately 9,000 gallons of fuel oil spilled into the Elizabeth River. NSCSA accepted immediate responsibility for the spill and coordinated its cleanup under the Oil Pollution Act of 1990 ("OPA"). NSCSA then brought this action against Moran, claiming that the oil spill was caused by Moran's negligence. It argues that Moran is obligated to reimburse NSCSA for the cost of the cleanup and the expenses it incurred compensating victims of the spill. Moran filed a counterclaim against NSCSA, alleging that the oil spill was caused by NSCSA's negligence and seeking indemnity from NSCSA for any liability Moran faces from third party claimants.

In its Second Amended Verified Complaint, NSCSA asserts four causes of action pursuant to: (1) general maritime law; (2) Virginia's State Water Control Law, Va. Code Ann. § 62.1-44.34:18(C)(4); (3) Virginia common law; and (4) the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq*. On June 15, 1995, Moran filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. By order filed August 14, 1995, this Court granted in part Moran's motion. The Court dismissed NSCSA's claim for recovery of removal costs and the cost of compensating victims of the spill under the State Water Control Law, Va. Code Ann. 62.1-44.34:18(C)(4), and NSCSA's claim, in its original complaint, for recovery under the Clean Water Act. The Court, however, retained NSCSA's right to proceed under the State Water Control Law to recover damages to its own property resulting from the collision.

On January 16, 1996, this case came before the Court for a non-jury trial. Evidence was presented over the course of three days. On February 20, 1996, each side submitted proposed findings of fact and conclusions of law. The Court later heard closing arguments, and the matter is now ripe for determination.

Appendix B

I. FINDINGS OF FACT

The M/V SAUDI DIRIYAH is a roll-on, roll-off cargo vessel of 25,036 gross registered tons with a length of 248.72 meters and a beam of 32.28 meters. The stern of the vessel is flared outward from the waterline. The reduced drag achieved by this hull configuration allows the vessel to maintain a high rate of speed while carrying a full container load. The M/V SAUDI DIRIYAH is owned and operated by NSCSA.

The HARRIET MORAN is a tug boat of 252 gross registered tons with a length of 92 feet and a beam of 29 feet. The HARRIET MORAN is owned by Moran Trade Corporation of Delaware. During the relevant time period, the tug was bareboat chartered to Moran Towing of Virginia, a division of Moran Mid-Atlantic Corporation.

A. The Collision

On December 1, 1993, the M/V SAUDI DIRIYAH was docked at Container Berth One at the Norfolk International Terminals ("NIT") in Norfolk, Virginia. She faced due north with her starboard side against the berth. The Master of the M/V SAUDI DIRIYAH was Captain Mario Grech. The vessel was scheduled to undock and shift to Lambert's Point Docks ("Lambert's Point") at 11:00 p.m. that evening. Lambert's Point is three to four miles upstream from NIT on the Elizabeth River.

NSCSA hired Captain John R. Morey, a docking pilot, to direct the shift to Lambert's Point. NSCSA contracted with Moran to provide tug assistance. Moran provided two tugs for the shift, the CAPE HENRY and the HARRIET MORAN. The Captain of the CAPE HENRY was Alvin Doucet; the Captain

of the HARRIET MORAN was William Lusk. Moran tugs had docked and uncocked the M/V SAUDI DIRIYAH and her sister ships with identical hull designs on other occasions. Captain Lusk himself, on one previous occasion, docked the M/V SAUDI DIRIYAH. Captain Lusk was an experienced tug master, and he was well aware of the flared hull design of the M/V SAUDI DIRIYAH.

On the night of December 1, 1993, visibility was good, and the river was calm. Captain Morey, the docking pilot, boarded the M/V SAUDI DIRIYAH at 10:45 p.m. At about the same time, the tugs arrived at NIT. While the ship's lines were taken in, the tugs held the vessel against the pier for about fifteen minutes. The HARRIET MORAN was on the port quarter; the CAPE HENRY was on the starboard bow. During this procedure, Captain Lusk observed the cut-away, flared stern of the M/V SAUDI DIRIYAH.

The undocking began at 11:04 p.m. Captain Grech, Master of the M/V SAUDI DIRIYAH, breasted the vessel off the pier by using the ship's bow and stern thrusters. These thrusters are propellers mounted on the side of the vessel, under the water line, inside tunnels approximately two meters in diameter. Each propeller is powered by a 1,800 horsepower engine. The thrusters are used to move the vessel sideways or to turn the vessel when there is little room for maneuvering.

At 11:07 p.m., after breasting the ship about 100 feet away from the pier, Captain Grech used the thrusters to make a port, counter-clockwise turn toward the Norfolk Harbor Reach. In its pier at NIT, the M/V SAUDI DIRIYAH was heading due north. To effect the shift to Lambert's Point, which is south/southeast of NIT, the vessel had to make a 180 degree turn from her

position at NIT. Because of the need to make this turn in a tight space, Captain Grech engaged the thrusters.

At 11:43 p.m., after the vessel had partially completed its 180 degree turn to port, the thrusters were stopped and the engines were ordered dead slow ahead. At this point, Captain Morey had the command of the vessel. He commenced an eleven degree starboard turn which took place over the course of 2.7 minutes. This starboard turn, or correction, was necessary to line up the vessel with the channel, while avoiding shallow water. Because the turn to starboard was slight, the thrusters were not engaged.

While the ship was making the eleven degree starboard correction, Captain Morey ordered the CAPE HENRY to lay on the starboard bow. He then radioed Captain Lusk on the HARRIET MORAN and ordered him to come in on the port quarter to assist with the turn into the river. Captain Lusk asked Captain Morey, "Do you want me to come in now?" Captain Morey responded, "No," and ordered Captain Lusk to hold off until the vessel had completed its starboard correction. After the vessel stopped turning to starboard, Captain Morey ordered Captain Lusk to come in on the port quarter to assist with the turn into the channel.[2]

---

2. Moran argues that Captain Morey ordered Captain Lusk to lay on the port quarter during the starboard correction. Moran insists that the stern thruster would prevent the tug from laying on the port quarter during a turn to port. Moran also argues that the times of each maneuver listed on the course recorder indicate that the collision occurred during the starboard turn. Although Moran's position is not without support, it is contradicted by the credible testimony of Captain Morey, a disinterested witness who is intimately familiar with the facts of this case. The weight of the evidence supports a finding that the contact between the M/V

(Cont'd)

Appendix B

At 11:16 p.m., in accordance with Captain Morey's order, Captain Lusk maneuvered the HARRIET MORAN alongside the port quarter of the M/V SAUDI DIRIYAH. Captain Lusk intended to land with the starboard shoulder of his tug against the port quarter of the ship. Instead, the stern of the tug made first contact. One of the tug's starboard quarter bitts struck the M/V SAUDI DIRIYAH and put a nine inch gash in her hull. The gash was in the flared portion of the vessel's stern near the "Dutch" chock, a place on the vessel where tugs customarily either push or pull the vessel with a rope. The collision punctured the M/V SAUDI DIRIYAH's fuel oil settling tank. Fuel oil immediately began spilling into the Elizabeth River.

Other than Captain Lusk, no one on either the M/V SAUDI DIRIYAH or the HARRIET MORAN saw, heard, or felt the collision. The M/V SAUDI DIRIYAH had no markings on her hull indicating where a tug should land or where a tug should not land. No sign alerted tug pilots to the location of the fuel oil settling tank. Captain Lusk was not advised of the flared design of M/V SAUDI DIRIYAH's hull or of the location of the fuel oil settling tank. As mentioned above, however, Captain Lusk was well aware of the vessel's flared stern, having docked and undocked the M/V SAUDI DIRIYAH and her sister ships on previous occasions. When the collision occurred, the HARRIET MORAN had no lookout other than Captain Lusk in the wheelhouse. Captain Lusk testified that if he had posted a lookout it would have been Eddie Sanders, the chief engineer, who was in the galley at the time of the collision.

(Cont'd)

SAUDI DIRIYAH and the HARRIET MORAN occurred after the starboard correction was completed. Even if the collision occurred during the starboard turn, however, the Court would still reach the same conclusion, that the collision was solely caused by the negligence of Captain Lusk. *See* discussion *infra* § II(B).

Appendix B

Shortly after the collision occurred, Chief Engineer Sanders came onto the deck of the HARRIET MORAN and smelled a stench, which he believed to be either petroleum or bilge water. He also saw that something was being discharged from the ship. After investigating, he notified Captain Lusk that oil or messy bilge water was coming from the M/V SAUDI DIRIYAH. At 11:18 p.m., Captain Lusk radioed Captain Morey on the bridge of the M/V SAUDI DIRIYAH and advised him that the vessel was pumping something overboard on the port quarter. Captain Lusk testified that he told Captain Morey that oil was coming from the M/V SAUDI DIRIYAH, and that he, Captain Lusk, might have caused it. Although Captain Lusk claims he received an acknowledgement of this transmission from Captain Morey, Captain Morey testified that he does not remember receiving any information from Captain Lusk except that the M/V SAUDI DIRIYAH was pumping something overboard. After notifying Captain Morey by radio, Captain Lusk called the United States Coast Guard ("USCG") on a cellular phone to advise it of the spill.

Following his radio conversation with Captain Lusk, Captain Morey immediately advised Captain Grech, who was also on the bridge of the M/V SAUDI DIRIYAH, that something was pumping overboard. Shortly later, Chief Mate Asif Zafer Khan, posted on the stern of the M/V SAUDI DIRIYAH, called Captain Grech and informed him of a discharge from the ship. At this point, Captain Grech suspected that some sort of pollution, either oil or dirty bilge water, was being discharged into the river. Captain Grech telephoned his engine room and ordered his crew to check whether the ship was pumping anything overboard.

The crew stationed in the vessel's engine room probed for the source of the discharge. After about twenty minutes of this

effort, Chief Engineer Ronald Reay searched the water with a spotlight and discovered a puncture in the vessel's shell plating around the fuel oil settling tank. Upon making this discovery, at about 11:45 p.m., the crew began gravitating oil from the settling tank to the double bottom tanks located in a lower level of the vessel. This transfer of oil could have been accomplished through the use of pumps, but gravitation was the quickest method.

While efforts were being made on the M/V SAUDI DIRIYAH to find the source of the spill and to control it, the vessel was slowly making its way to Lambert's Point. The M/V SAUDI DIRIYAH arrived at Lambert's Point, Pier P, at 12:00 midnight on December 1, 1993. Once alongside the berth, Captain Grech listed the vessel to the starboard side approximately 1.5 degrees in order to raise the puncture hole above the level of the oil in the settling tank. Oil stopped leaking from the ship between 1:00 a.m. and 1:15 a.m. on December 2, 1993.

Captain Grech testified that he gave a copy of the ship's course recorder tracing, which indicates the movements of the vessel, to the USCG. He does not know what became of the original course recorder tracing. At the time of the collision, the ship was not keeping a record of engine movements. The printing ribbon on the automatic bell logger was not operational and no handwritten bell book was kept.

As a result of the collision, NSCSA lost $3,250 in fuel oil. In addition, NSCSA spent $16,050 to repair the hole which the HARRIET MORAN punctured into the hull of the M/V SAUDI DIRIYAH.

Appendix B

B. The Cleanup

Approximately 9,000 gallons of fuel oil spilled into the Elizabeth River, as a result of the collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH. The oil spread throughout a wide area along the river. It stained and soiled beaches, pilings, bulkheads, piers, and boats. The oil did not, however, create any serious or long-term environmental damage.

Shortly after the M/V SAUDI DIRIYAH arrived at Lambert's Point, the USCG boarded her to investigate the spill. Captain Grech had not contacted the USCG during the shift to Lambert's Point. He claims that he could not call the USCG with his cellular phone because its batteries were dead. He did not explain why he did not radio the USCG. The USCG immediately assumed control of the cleanup and hired Industrial Marine Service ("IMS") as the spill response contractor. IMS began removal procedures in the early morning of December 2, 1993, by placing booms around the vessel to contain the spread of oil.

On December 2, 1993, the USCG designated NSCSA as the "responsible party" for the spill under OPA. That same day, NSCSA hired Brian Pringle as the incident commander, responsible for managing and coordinating the cleanup efforts. Mr. Pringle previously served with the USCG and the Merchant Marine. For a period of time he worked as a marine surveyor. He had extensive experience in oil spill cleanup operations, including many operations involving spills of the same size or larger than the spill from the M/V SAUDI DIRIYAH. Mr. Pringle was out of state several days during the cleanup. On these days, Kenneth Meyers stood-in as acting commander. Moran

appointed William Neubrand, President of Mid-Atlantic Marine Surveyors, to monitor the cleanup on its behalf. Mr. Neubrand had no operational authority over the response actions. NSCSA hired IMS as a response contractor, and IMS thereafter worked under Mr. Pringle's direction. IMS subcontracted with PetroChem and CleanAmeria to provide additional labor. NSCSA also hired two other contractors, A&A Environmental and OH Materials, to assist with the cleanup efforts.

For the first four days following the spill, the primary cleanup efforts were directed at removing all free floating oil from the river. The USCG cutter COWSLIP and four Navy vessels participated in this portion of the cleanup by skimming oil from the river. On December 6, 1993, the cleanup efforts shifted to cleaning docks, piers, wharfs, bulkheads, rip rap, and beaches in the southern, eastern, and western branches of the Elizabeth River.

During the cleanup, nightly meetings were held to discuss cleanup priorities. Members of the unified command attended these meetings. The unified command consisted of representatives from NSCSA and the USCG, as well as federal, state, and local officials. Each evening following the unified command meeting, Mr. Pringle met with Mr. Neubrand and representatives of IMS to discuss priorities and create plans for the following day. At one such meeting on December 4, 1993, Mr. Pringle, Mr. Neubrand, and IMS management personnel discussed the plan for the next stage of the cleanup effort, focussing on removal of oil from shorelines and manmade structures along the waterfront. At this meeting, Mr. Neubrand recommended the use of hot water pressure washing, using machines commonly referred to as "hotsys," as the most efficient means of removing oil from manmade structures. A hotsy sprays

hot water out of a metal wand under extremely high pressure. When the wand is aimed at a polluted structure, such as a bulkhead, the pressurized water blasts oil from the surface of the structure. William P. Athayde, of IMS, likewise advised in favor of the use of hotsys. Mr. Pringle, however, believed that hand-wiping and handcleaners were the best method for removal of oil from the majority of the soiled structures.

On the evening of December 6, 1993, at the unified command meeting, the USCG issued a directive which established the priorities to be followed by NSCSA and the cleanup methods to be employed. The directive states in part:

> Low priority: Removal of Oil Adhered to Seawalls and Piers . . . Techniques for removal of the oil should be initiated by physical removal by wiping or scraping. Use of detergents is not recommended. High pressure water or hot water washing may be necessary and requires recovery of released oil by sorbents and boom techniques.

Mr. Pringle interpreted this directive as requiring that shore-side structures be cleaned first by hand-wiping, and, in the event that hand-wiping proved ineffective, hotsys might then be employed. Gary L. Ott, science support coordinator for the National Oceanographic and Atmospheric Administration ("NOAA"), drafted the USCG directive. He testified that he had no additional communication with Mr. Pringle about the meaning of the directive.

Under the direction of Mr. Pringle, the response contractors cleaned oil from shore-side structures, beaches, and rip rap using a variety of techniques. Most areas were passively cleaned by

deploying snare on a rope to collect free-floating oil and to work with tide changes and wave action to clean structures. Snare looks like a pom-pom. It is composed of strips of plastic, and it is very effective at absorbing oil. In rip rap and beach areas, the cleanup crew "mucked out" oil pockets with rags and snare and sometimes flushed the rocks with hot water. Many structures were hand-wiped, or scraped, using hand cleaners and absorbent rags or snare.

In certain areas, passive techniques and hand-wiping were not completely effective. Several areas failed inspection and subsequently were cleaned using hotsys. In other areas where passive methods and hand-wiping were employed, no additional cleaning was necessary. In some areas, such as "The Hague" and "Hospital Point," hot water pressure washing was the primary method used by the contractors.

At the Tidewater Yacht Agency, a large boat pier and marina, the response contractors used hand-wiping and hand cleaners exclusively. Mr. Pringle did not use hotsys at the marina because a number of the pilings and bulkheads were deteriorated and the pressure from the hotsys might have caused structural damage. He was also worried that pressure washing along the deteriorated bulkheads may have pushed oil into the ground under the marina's parking lot. Additionally, attempts to hotsy pilings and bulkheads in the marina probably would have resulted in overspray and further damage to boats, walkways, and railings. For these reasons, Mr. Pringle determined that hand-wiping was the most cost-effective method of cleaning the marina.

Cleanup efforts ended on January 6, 1994. The next day the USCG approved the termination of response activities.

Appendix B

NSCSA spent $868,356.80 to cleanup the oil which spilled from the M/V SAUDI DIRIYAH on December 1-2, 1993. The total expense consisted of the following: (1) $758,265.21 to IMS; (2) $1,724.82 to the City of Norfolk; (3) $524.32 to TC Analytics; (4) $57,146.47 to Woodward-Clyde; (5) $27,031.51 to Brian Pringle; (6) $16,741.97 to Kenneth Meyers; (7) $2,670.00 to marine surveyors Stott & Ogram; and (8) $4,252.50 to Martinair. In addition, the United States Navy and the USCG have asserted combined claims of approximately $300,000 for expenses incurred during their participation in the cleanup. The final amounts of these claims are, for now, undetermined.

Moran argues that NSCSA's cleanup expenses were unreasonable. Specifically, Moran contends that NSCSA should have limited the use of hand-wiping, and, instead, employed hot water pressure washing to clean piers, pilings, bulkheads, and other structures. Mr. Neubrand and Moran's expert, Joseph J. Ledbetter, testified that NSCSA could have saved over $300,000 in cleanup costs if it had used hotsys more often, because that method is quicker and requires fewer workers.

The Court rejects Moran's argument and finds as a fact that the cleanup expenses NSCSA incurred were reasonable. First, Mr. Pringle's interpretation of the USCG's directive was perfectly reasonable. The language of the directive suggests that the USCG wanted NSCSA to use hand-wiping first, to be followed by hot water pressure washing, if necessary. Because Mr. Pringle had no further communications with the author of the directive, Mr. Ott, the directive itself was all the guidance he received from the USCG.

Second, the evidence presented was mixed regarding methods of oil cleanup. Certain experts testified that hand-

wiping was the most appropriate method, while others testified to the effectiveness of hotsys. Hand-wiping has its advantages, and it is not apparent from the evidence that the cleanup would have cost any less had hot water pressure washing been employed more often. In fact, it might have cost more if the use of hot water pressure washing caused damage to older bulkheads, piers, and pilings, as Mr. Pringle feared.

Third, Moran's criticism of NSCSA's cleanup operation is nothing more than "Monday-morning quarterbacking." If Moran truly believed that inefficient methods were being used, it could have insisted that NSCSA employ other techniques. As it happened, however, Moran never voiced a strenuous demand that NSCSA cleanup in a certain manner or a strenuous objection to what was being done. Mr. Neubrand claims he frequently insisted on the use of hotsys; however, Mr. Pringle recalls only one occasion when Mr. Neubrand took such a position. The only written evidence of Mr. Neubrand's concern is contained in two communications to Moran. In a fax sent December 22, 1993, Mr. Neubrand complained that hotsys should have been used on the Portsmouth waterside. The second written communication expressing Mr. Neubrand's concern was dated one day before cleanup operations ceased, too late to have any impact on the cleanup. The evidence also shows that Mr. Neubrand's position during the cleanup was not consistent. On December 13, 1993, Mr. Neubrand wrote Moran and stated that he was satisfied with the cleaning position taken by NSCSA with respect to the Tidewater Yacht Agency marina, where hand-wiping was used exclusively. Certainly, during the cleanup, Mr. Neubrand did not convey his opinion on use of hotsys as strongly as he did in court over two years later. The Court will not condone Moran's second-guessing of NSCSA's choice of cleanup methods, when it failed to effectively challenge these methods during the cleanup.

Appendix B

C. Third Party Complaints

The oil that spilled from the M/V SAUDI DIRIYAH soiled over 200 private vessels along the Elizabeth River. To handle complaints from those affected by the spill, NSCSA retained Turnaboat Services, Ltd. ("Turnaboat"). Turnaboat set-up and advertised a toll-free telephone number for those affected by the spill to call and report claims. A total of 240 claims were reported to Turnaboat. Of those claims, 209 were negotiated to a settlement and approximately thirty were denied. Only one reported claim, by Tidewater Yacht Agency, resulted in litigation. NSCSA paid a total of $106,806.12 in third party claims, mostly to pleasure boat owners for oil staining.

Turnaboat's fees for adjusting services totalled $174,637.70. Although this amount appears high in relation to the amount of money actually paid to third party claimants, it may be reasonable given the services provided by Turnaboat, and the likelihood that litigation, more costly than Turnaboat's fees, could have resulted without these services. However, certain problems with the evidence regarding Turnaboat's fees prevent the Court from determining the extent to which NSCSA is entitled to recover this element of its damages.

R. Bruce Tillman of Turnaboat testified that Turnaboat's fees for the last several months were mostly for litigation support. He did not testify as to what portion of Turnaboat's fees represented services provided to NSCSA in regard to this lawsuit. NSCSA failed to introduce any evidence showing which of Turnaboat's bills were for adjusting services and which of its bills were for litigation support. The Court cannot determine on its own which portion of Turnaboat's fees are recoverable, because Turnaboat's bills, Plaintiff's Exhibit 81, the only exhibit

admitted into evidence on this point, do not reveal the content of the services which each invoice represents.[3] Any decision made by the Court on this point, therefore, would be pure speculation, which the law does not allow in a damage determination. *See, e.g., State Farm Fire and Casualty, Co. v. Barton*, 897 F.2d 729, 733 (4th Cir. 1990).

Furthermore, Mr. Tillman testified that Mr. Wiswell, an employee of Turnabout who submitted bills for work done on the M/V SAUDI DIRIYAH oil spill, was also a partner of Freehill, Hogan & Mahar, a New York law firm representing NSCSA as co-counsel in this case. Although Mr. Wiswell can certainly wear two hats, as an employee of the corporation and as a partner in the law firm, it is impossible to determine from the evidence whether Mr. Wiswell performed any services for NSCSA, as an employee of Turnaboat, in relation to NSCSA's lawsuit against Moran. Any services of Mr. Wiswell in this regard would be considered unrecoverable attorney's fees; therefore, the Court cannot ascertain whether any portion of Mr. Wiswell's fees are recoverable in this case.

For the foregoing reasons, NSCSA failed to meet its burden of proving the amount of recoverable fees paid to Turnaboat. Accordingly, the Court denies NSCSA any recovery of Turnaboat's fees as an element of its damages.

II. CONCLUSIONS OF LAW

This matter falls within the Court's federal question and admiralty jurisdiction. *See* 28 U.S.C. §§ 1331 and 1333.

---

3. There was also testimony by Mr. Tillman concerning an incorrect bill charging NSCSA for one extra hour of work. While insignificant, the Court cannot determine which bill was referenced by Mr. Tillman.

Appendix B

A. Relationship Between OPA Contribution and State Common Law

From its inception, when the HARRIET MORAN collided with the M/V SAUDI DIRIYAH, this case has been governed by the Oil Pollution Act of 1990. Immediately after the M/V SAUDI DIRIYAH arrived at Lambert's Point, the USCG took control of the cleanup operations. Just hours after the spill began, the USCG designated NSCSA as the "responsible party," under the terms of OPA. NSCSA coordinated cleanup efforts in accordance with its obligations under the Act, and it compensated the victims of the spill to the extent it believed it was liable under OPA. It is not surprising, therefore, that when NSCSA brought this action against Moran it sued under the contribution provision of OPA.[4] In addition, however, NSCSA

---

4. NSCSA sued under both the contribution and subrogation provisions of the Act. As the Court advised counsel during closing arguments, however, the proper vehicle for NSCSA's recovery against Moran is the contribution provision of OPA, rather than the subrogation provision. Section 2702(d)(1)(B) provides:

> If the responsible party alleges that the discharge or threat of a discharge was caused solely by an act or omission of a third party, the responsible party . . . shall be entitled by subrogation to all rights of the United States Government and the claimant to recover removal costs or damages from the third party or the Fund paid under this subsection.

33 U.S.C. § 2702(d)(1)(B). Under the theory of subrogation, NSCSA would step into the shoes of those injured by the spill and sue Moran under the liability provisions of OPA. In this case, however, Moran is not liable to those injured by the spill under OPA. The Act only imposes liability against responsible parties, i.e., owners and operators of the

(Cont'd)

asserts three other claims against Moran pursuant to: (1) general

---

(Cont'd)

discharging vessel, and third parties not under a contractual relationship with a responsible party. *See* 33 U.S.C. 2702(d)(1)(A) (stating that a third party, as described in section 2703(a)(3), may be treated as the responsible party if it was the sole cause of the spill; section 2703(a)(3) excludes from the definition of third parties those persons acting under a contractual relationship with a responsible party). In this case, Moran is not a responsible party, and, because it was operating under a contractual relationship with NSCSA, it may not be treated as a responsible party. Therefore, section 2702(d)(1)(B) is not the proper vehicle for NSCSA's recovery.

The appropriate provision, under which NSCSA may recover against Moran, is the contribution clause, section 2709: "A person may bring a civil action for contribution against any other person who is liable or potentially liable under this chapter or another law." 33 U.S.C. § 2709.

In "Plaintiff's Supplemental Post-Trial Brief," submitted to the Court more than two weeks after closing arguments, NSCSA claims that it is also entitled to relief under section 2715 of OPA. That section states that:

> Any person, including the Fund, who pays compensation pursuant to this chapter to any claimant for removal costs or damages shall be subrogated to all rights, claims, and causes of action that the claimant has under any other law.

33 U.S.C. § 2715. Although Plaintiff may be entitled to relief under section 2715, its recovery under that section would be limited to $106,802.12, the total amount NSCSA paid to third party claimants. *See supra* § I (C). Because Plaintiff is entitled to recover this amount plus its cleanup expenses, up to $500,000, under OPA's contribution provision, the Court will construe Plaintiff's OPA claim as one for contribution pursuant to section 2709.

maritime law; (2) Virginia's State Water Control Law, Va. Code Ann. § 62.1-44.34:18(C)(4); and (3) the Virginia common law theories of subrogation,[5] indemnity, contribution, and restitution.

Counsel for NSCSA candidly admits that these additional claims were added to allow NSCSA to recover the full amount of its cleanup expenses despite OPA's liability limitation provision. Under section 2704 of OPA, a person's liability under the Act is limited in accordance with the type and size of vessel or facility involved in the spill. 33 U.S.C. § 2704(a).[6] Although

---

5. Moran notes that NSCSA's Second Verified Amended Complaint does not specifically state a claim for relief under the Virginia common law theory of subrogation. Although this is true, under the liberalized pleading rules contained in the Federal Rules of Civil Procedure, a plaintiff need not use specific language in his complaint to get relief under the law. *See* Fed. R. Civ. Pro. 8(a). NSCSA may have properly stated a claim for common law subrogation, despite not having used the word "subrogation" in its common law count. The Court need not decide whether this is the case, however, because this matter is fundamentally an OPA action, subsuming NSCSA's state law claims. *See infra* at 24-27.

6. The congressional decision to limit a vessel owner's liability under OPA is firmly rooted in economic theory. Under the statute, the owner of a large vessel, like the M/V SAUDI DIRIYAH, is exposed to much greater liability than the owner of small vessel, like the HARRIET MORAN. *See* 33 U.S.C. § 2704(a). This scheme places the greatest exposure upon those who are in a position to obtain the most benefit from maritime commerce. Certainly, the owners of a large cargo vessel receive a greater benefit from the vessel's activity in this area than the owners of the tug boat which assists with the cargo vessel's docking procedure. The owners of large vessels, therefore, are in a better position to insure against an oil spill or to absorb the cost of a spill and pass the cost on to their customers. By placing the greatest risks of operating a vessel in the navigable waters of the United States upon those who receive

(Cont'd)

section 2704 applies specifically to "responsible parties," *id.*, the liability of a third party that causes an oil spill, like Moran, is also subject to the liability limits established in that section. 33 U.S.C. § 2702(d)(2)(A). In this case, Moran's liability for a spill caused by the HARRIET MORAN, a non-tank vessel, is limited by the greater of $600 per gross ton or $500,000. *Id.* The HARRIET MORAN is 252 gross tons, so Moran's liability under OPA is limited to $500,000, unless one of the exceptions to limitation applies.[7]

NSCSA seeks to escape OPA's limitation provision by bringing multiple counts under general maritime law, state statutory law, and state common law. First, OPA clearly preempts maritime law as to recovery of cleanup expenses and the cost of compensating injured persons. A Court exercising its admiralty jurisdiction will apply the general maritime law only in the absence of a relevant federal statute. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986). In this case, OPA provides NSCSA with a remedy against Moran; it,

---

(Cont'd)
the greatest benefits from doing so, the statute's liability scheme allows the costs associated with oil spills to be spread among all those who benefit from maritime commerce, including those who consume products which are shipped from overseas.

7. NSCSA argues that the $500,000 liability limit applies only to removal costs. NSCSA insists that it, therefore, is entitled under OPA to recover $500,000 of its removal costs plus the expenses it incurred compensating victims of the oil spill. NSCSA's position on this point contradicts the plain language of the statute, which limits "the *total liability* of a responsible party under section 2702 of this title *and any removal costs* incurred by, or on behalf of the responsible party." 33 U.S.C. § 2704(a) (emphasis added). Thus, a party's total liability under OPA is limited by § 2704, not simply its liability for removal costs.

therefore, preempts the general maritime law as to recovery of cleanup expenses and the cost of compensating third parties. NSCSA argues that its maritime claim for recovery of these damages is preserved by section 2751 of OPA. That section states: "Except as otherwise provided in this chapter, this chapter does not affect . . . admiralty and maritime law." 33 U.S.C. § 2751. However, section 2751 only preserves admiralty claims which are not addressed in OPA, such as NSCSA's claim against Moran for its collision damages. Because OPA provides a comprehensive scheme for the recovery of oil spill cleanup costs and the compensation of those injured by oil spills, the general maritime law does not apply to recovery of these types of damages.

Second, this Court has already ruled, in its order granting in part Moran's Motion to Dismiss, that NSCSA may not recover its response costs and amounts paid to third parties under Virginia's State Water Control Law. The only claims left to be considered, therefore, are those brought pursuant to Virginia common law.

Neither the Court nor counsel for the parties discovered any reported case interpreting OPA's contribution provision. The relationship between OPA's contribution provision and state common law, therefore, has not been determined. NSCSA argues that OPA's "savings clause" preserves its right to seek contribution from Moran under both OPA and state law. Section 2718(a), the savings clause, provides:

> Nothing in this chapter . . . shall —
>
> (1) affect, or be construed or interpreted as preempting, the authority of any State or political

> subdivision thereof from imposing any additional liability or requirements with respect to —
>
> (A) the discharge of oil or other pollution by oil within such State; or
>
> (B) any removal activities in connection with such a discharge; or
>
> (2) affect or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law.

33 U.S.C. § 2718(a).

The purpose behind the savings clause is to allow the states to impose liability upon oil polluters above the liability imposed through OPA. Congress wanted to give the states the power to force polluters to cleanup completely oil spills and to compensate the victims of oil spills, even if their liability for these remediation expenses is limited under OPA. The legislative history of the Act makes this point:

> The theory behind the [savings clause] is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection for its own resources and citizens is entitled to do so.

S. Rep. No. 94, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 728. At the time Congress enacted OPA, twenty-

four states had oil spill liability and compensation laws. *Id.* Of these twenty-four, seventeen did not set any liability limitation. *Id.* Unlimited liability for polluters is based on two principles: "a polluter should pay in full for the costs of oil pollution caused by that polluter; and, a victim should be fully compensated." *Id.*[8]

The savings clause was added to allow the states to enact legislation protecting their citizens and their resources to a greater extent than the protection offered by OPA. It was meant to allow the states to go beyond the basic protection of the federal law. The beneficiaries of the savings clause, therefore, are the victims of oil spills. The savings clause was clearly not intended to affect liability between two vessels involved in an oil spill. Congress never intended for a party in NSCSA's position to benefit from the savings clause; companies whose ships spill oil in the waters of the United States, like NSCSA, were meant to be the victims of the savings clause, not its beneficiaries. NSCSA's interpretation of section 2718, therefore, is a distortion of the purpose behind that section's enactment.

NSCSA also argues that its state common law claims are preserved by section 2710(c) of OPA. Subsection (c) of section 2710, concerning indemnification agreements, states: "Nothing in this chapter . . . bars a cause of action that a responsible party

---

8. Virginia imposes liability upon oil polluters in addition to the liability imposed under federal law. *See* Va. Code Ann. § 62.1-44.34:18(C)(4). The Virginia statute, however, limits a person's liability to its financial responsibility as determined by the State Water Control Board pursuant to Va. Code Ann. § 62.1-44.34:16, or to $10,000,000, whichever is greater. Va. Code Ann. § 62.1-44.34:18(H). In this case, the liability did not exceed $10,000,000, so the State Water Control Board's determination of Moran's financial responsibility is irrelevant.

subject to liability under this chapter, or a guarantor, has or would have, by reason of subrogation or otherwise, against any person." The Court rejects NSCSA's argument. Subrogation would allow NSCSA to stand in the place of those third parties who were compensated by NSCSA for losses resulting from the oil spill. However, in this case, no third party has filed any state law claim. NSCSA's liability has been circumscribed completely by OPA. For this reason, and because NSCSA has a remedy against Moran under OPA, it may not hold Moran liable to an extent greater than that allowable under the Act.

From its inception, this case has been controlled by OPA. NSCSA's liability for cleaning up the oil spill and compensating its victims derived exclusively through OPA. NSCSA spent close to one and a half million dollars as a result of the spill. This amount does not even approach the liability limitation under OPA for a ship the size of the M/V SAUDI DIRIYAH. As a non-tank vessel, NSCSA's liability for a spill caused by the M/V SAUDI DIRIYAH is limited under the Act to $600 per gross ton. 33 U.S.C. § 2704(a). The M/V SAUDI DIRIYAH is 25,036 gross tons, so NSCSA's liability limitation under OPA for a spill from that vessel is $15,021,600. Therefore, Virginia's State Water Control Law, which is meant to impose liability above that imposed through OPA, never was invoked by the state or by any claimant. Likewise, neither the state nor any third party sued NSCSA under Virginia common law.

OPA set NSCSA's liability in this case; OPA also provides NSCSA with a remedy against Moran. Section 2709 provides: "A person may bring a civil action for contribution against any other person who is liable or potentially liable under this chapter or another law." 33 U.S.C. § 2709. As discussed in detail below, Moran is liable to NSCSA under "another law," i.e., general

maritime law. *See infra* § II(B). Under section 2709, therefore, NSCSA may recover from Moran money it was forced to spend as a result of Moran's negligence. Because OPA has controlled this action from the beginning, and because Congress provided in OPA a vehicle for a party in NSCSA's position to recover from negligent third parties, NSCSA must proceed under OPA. The Court will not allow NSCSA to distort the intent of the savings clause and seek contribution from Moran under a state common law theory when NSCSA's liability in no way was dependant upon state law. In this case, therefore, where NSCSA's liability was imposed exclusively under OPA, NSCSA is restricted to the contribution scheme provided in the Act. Because Moran is liable to NSCSA through section 2709 of OPA, Moran's liability is limited to $500,000 under section 2704(a), so long as no exception to limitation applies.

There may be a case, however, where a responsible party under OPA is allowed to seek contribution against a negligent third party under both OPA and state law. Consider, for example, a case where an oil spill causes one million dollars of damage, but the responsible party's liability under OPA is limited to $500,000. If the spill occurred in Virginia, the responsible party may have to pay for the full cost of the spill despite the liability limitation contained in OPA because a person's liability under Virginia's State Water Control Law may be higher than its liability under OPA. *See* Va. Code Ann. §§ 62.1-44.34:16, 62.1-44.34:18(C) and (H).[9] If the spill was caused by the negligence of a third party, as it was in this case, it is reasonable to assume that the responsible party may: (1) sue the third party for contribution under section 2709 of OPA; and (2) be subrogated to the rights of the state and of other claimants under the State Water Control Law. In this way, the responsible party, whose

9. *See supra* note 8 and accompanying text.

ultimate liability was not restrained by OPA, could recover the full cost of the spill from the third party despite any liability limitation the third party might enjoy under OPA.

It would be manifestly unfair, in this hypothetical case, to allow the negligent third party to benefit from the protection of OPA's limitation provision while the responsible party receives no such protection. In fact, there is evidence in the legislative history that Congress intended to allow contribution actions in addition to actions brought under section 2709. *See* H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 789 (stating that section 2709 is not meant to bar contribution actions under other law). The hypothetical case outlined above is a perfect example where contribution or subrogation under both OPA and state common law should be allowed.

It is important to note, however, that this hypothetical presents a very different case from the one before the Court. In the case at bar, NSCSA's liability derived exclusively from OPA. State law was never imposed to force NSCSA to cleanup the spill or to compensate its victims. This is a pure OPA case. NSCSA may not go beyond the law which defined its own liability, and which provides it with a remedy, in order to circumvent the restrictions of that law.

B. MORAN'S LIABILITY UNDER SECTION 2709

Having determined that this case must be analyzed under section 2709 of OPA, at least with regard to NSCSA's claim for recovery of its cleanup costs and money it paid to third party claimants, the Court must now decide whether Moran is liable to NSCSA under OPA's contribution clause. As discussed above,

section 2709 allows a person to seek contribution against another person who is liable under OPA or under "another law." Other than through section 2709, Moran is not liable under OPA because it had a contractual relationship with the responsible party, NSCSA. *See supra* note 4. The question then is whether Moran is liable to NSCSA under "another law."

This case involves a collision between two vessels on the navigable waters of the United States. This Court, therefore, has admiralty jurisdiction over the matter. *See* 28 U.S.C. § 1333. "With admiralty jurisdiction comes the application of substantive admiralty law. Absent a relevant statute, the general maritime law, as developed by the judiciary, applies." *East River S.S. Corp.*, 476 U.S. at 864 (citations omitted). Other than OPA, therefore, the law which controls Moran's liability to NSCSA is the general maritime law.

In its complaint, NSCSA alleges that the collision was caused by Moran's negligence and that the HARRIET MORAN was unseaworthy at the time of the accident. Negligence under maritime law is simply the failure to use reasonable care under the circumstances. 8 *Benedict on Admiralty* § 3.02[B][4] (7th ed. 1995). Unseaworthiness is similar to negligence, but relates to a condition of the vessel which renders it unfit for its intended purpose. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).[10]

NSCSA presented ample evidence at trial to prove Moran's negligence. Negligence can be shown by a variety of acts or omissions including excessive speed, failure to use navigational

---

10. No evidence was presented at trial to suggest that the HARRIET MORAN was unseaworthy on the day of the collision. Apparently, NSCSA has abandoned that claim.

aids, or failure to execute proper orders. The most common way negligence is shown in the maritime setting, however, is by proving a violation of some rule of navigation. Because the collision in this case happened on the inland waters, the parties were bound by the Inland Navigational Rules, 33 U.S.C. §§ 2001-2038. NSCSA alleges that Moran breached duties imposed by these rules and by other federal law. NSCSA asserts violations of the federal law requiring a proper lookout, 33 U.S.C. § 2005, and the Vessel Bridge-to-Bridge Radiotelephone Act, 33 U.S.C. §§ 1201-1208, 33 C.F.R. § 26.04.

The proper lookout statute provides:

> Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

33 U.S.C. § 2005. This statute provides for a relatively broad range of factual findings regarding whether a lookout was "proper." A violation of the proper lookout statute flows from a finding of negligent conduct. *Inland Oil & Transp. Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983).

Likewise, the Radiotelephone Act is permissibly vague. It requires that:

> Each person who is required to maintain a listening watch under section 5 of the Act shall, when necessary, transmit and confirm, on the designated frequency, the intentions of his vessel and any other information necessary for the safe navigation of vessels.

33 C.F.R. § 26.04. The question in a case involving either the Radiotelephone Act or the proper lookout statute, therefore, reverts to whether the conduct in question was negligent, in that communication was "necessary for the safe navigation of vessels," or a lookout was able to "make a full appraisal of the . . . risk of collision."

Litigants in admiralty cases typically allege statutory violations in order to invoke "The Pennsylvania Rule." Under this rule, established by the Supreme Court in *The Pennsylvania*, 86 U.S. (19 Wall) 125, 136 (1873), when a vessel violates one of the statutes affecting navigation, it is presumed that the violation is at least a contributing cause of the collision. The burden then shifts to the vessel to show, not merely that the violation was not, "but also that it *could not have been* a contributing cause of the disaster." *In re Hellenic Lines, Ltd.*, 1984 A.M.C. 57, 69 (E.D. Va. 1982) (citation omitted) (emphasis added). The rule also applies to hold the vessel owner liable, if the owner had privity or knowledge of the violation. *Id.* Because the violation of a statute would shift the burden of proof to Moran under The Pennsylvania Rule, the Court must initially address the question of whether Moran violated any federal rule of navigation.

First, NSCSA maintains that Moran's failure to post a separate lookout on the HARRIET MORAN during the undocking maneuver constituted a violation of the proper lookout statute. NSCSA's argument on this point lacks merit. Although a tug may require a separate lookout in certain instances, when the tug is assisting a vessel in docking or undocking, no lookout other than the pilot in the wheelhouse is typically required. A tug boat serves in various capacities. *Farrell Lines, Inc. v. S.S. Birkenstein*, 207 F. Supp. 500, 506 (S.D.N.Y.

1962). During certain of her duties, the tug must post a separate lookout. For instance, when a tug sails independently, the tug master may be under the same duty as the master of any other vessel to post a lookout. *Id.* at 507. A tug master may also be required to post a lookout when the tug sails with a barge in tow, particularly if the pilot's view is obscured by the barge. *See C.G. Willis, Inc. v. The Spica*, 6 F.3d 193, 198 (4th Cir. 1993) (holding that "a myopic tug with a protruding and displaced tow" must post a separate lookout, while a tug without visual obstructions need not) (quoting *Esso Standard Oil Co. v. Oil Screw Tug Maluco I*, 332 F.2d 211, 214 (4th Cir. 1964)); *In re Tug Harbor Star*, 433 F. Supp. 854, 864-66 (E.D. Pa. 1977) (holding that a tug in the process of shortening-up its tow should have posted a lookout astern); *Farrell*, 207 F. Supp. at 507 (stating that a tug in charge of a flotilla of barges is required to post a separate lookout). The same holds true when a tug pushes a barge upriver. *See Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1159-60 (2nd Cir. 1978) (holding that the pilot steering a tug is not a proper lookout when the tug is pushing a barge), *cert. denied*, 440 U.S. 959 (1979).

When a tug assists another vessel with a docking or undocking maneuver, however, there is no absolute requirement that the tug master post a separate lookout. *Marcona Corp. v. Oil Screw Shifty III*, 615 F.2d 206, 209 (5th Cir. 1980) (holding that tug operator assisting in docking another vessel did not violate the proper lookout statute, the court stated: "There is no absolute duty to maintain a lookout . . . during the final stages of mooring."). Under these circumstances, whether a separate lookout is required depends upon the facts and circumstances surrounding the procedure and type of collision which resulted. *Id.*

Appendix B

In this case, the conditions on the night of the accident and the physical layout of the tug suggest that no separate lookout was needed. On the night of December 1, 1993, the sky was clear and the seas were calm. Captain Lusk, master of the HARRIET MORAN, was in the wheelhouse at the time of the collision with the M/V SAUDI DIRIYAH. He testified that he had an almost complete view of his surroundings through the windows of the wheelhouse. The HARRIET MORAN was laying a short distance off the port quarter of M/V SAUDI DIRIYAH. Captain Lusk testified that he had the best possible view of the ship from the wheelhouse. It does not appear that a separate lookout would have been of much assistance to the Captain.

It is also important to note the type of collision involved in this case. The lookout statute was designed to prevent collisions between vessels which could not completely observe each other's movements. When a tug assists with an undocking procedure, the tug pilot has a clear view of the other vessel from the wheelhouse. Moreover, a controlled collision is intended. Under these circumstances, involving this type of collision, the federal navigational rules do not require a tug to post a separate lookout. *See Farrell*, 207 F. Supp. at 507.

Second, NSCSA argues that Moran violated the Vessel Bridge-to-Bridge Radiotelephone Act, 33 U.S.C. 1201-1208, 33 C.F.R. § 26.04. Specifically, NSCSA contends that Captain Lusk should have radioed the docking pilot, Captain Morey, immediately after the collision and informed him that the discharge from the M/V SAUDI DIRIYAH flowed from a rupture in the hull caused by a collision with the HARRIET MORAN. Contradictory evidence on this point was presented at trial. Captain Lusk claims that he told Captain Morey that he may have caused the discharge. Captain Morey insists that he never

received that information from Captain Lusk. Even under Captain Morey's version of events, Captain Lusk did not violate the Radiotelephone Act. The Act requires radio communication necessary for safe navigation. *See* 33 C.F.R. § 26.04. The evidence is undisputed that Captain Lusk and Captain Morey were in continuous radio contact throughout the docking procedure. Navigational safety was certainly not compromised by Captain Lusk's failure to notify Captain Morey of the origin of the discharge from the M/V SAUDI DIRIYAH. Even assuming, *arguendo*, that Captain Lusk's failure to so notify Captain Morey constituted a violation of the Act, this violation clearly did not cause the collision because it occurred *after* the collision. NSCSA's argument on this point, therefore, is bordering on frivolous.

Although Moran violated no federal navigational standard, it may still be liable to NSCSA due to the negligence of Captain Lusk. After being instructed by Captain Morey to land his tug on the port quarter of the M/V SAUDI DIRIYAH, Captain Lusk closed in for his landing. He intended to place the starboard shoulder of his tug against the vessel. Instead, the stern of the tug moved toward the ship in the last few seconds before the shoulder landed. Captain Lusk was unable to explain why his tug landed stern-first. When the stern of the HARRIET MORAN made contact with the port quarter of the M/V SAUDI DIRIYAH, the starboard quarter bitt of the HARRIET MORAN punctured the fuel oil settling tank of the M/V SAUDI DIRIYAH and caused oil to spill out of the vessel.

If Captain Lusk had maneuvered his tug with more caution, he could have landed his tug as he intended, shoulder first, and the oil spill would not have happened. His failure to properly control his vessel constitutes a lack of due care; and, therefore,

is negligence under maritime law. *See Benedict on Admiralty*, *supra* at 28, § 3.02[B][4]. Captain Lusk's negligence was the proximate cause of the collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH and the proximate cause of the resulting oil spill.

In its answer and counterclaim, Moran asserts that the collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH was caused by the negligence of Captains Grech and Morey. Moran maintains that either Captain Grech or Captain Morey should have advised Captain Lusk to land his vessel forward from the flared portion of the M/V SAUDI DIRIYAH. Moran also claims that Captain Grech should have advised the tug captain of the location of the fuel oil settling tank, so that he could have avoided that section of the ship. Finally, Moran argues that NSCSA should have painted a sign on the side of the M/V SAUDI DIRIYAH such as "Tugs Here," indicating where tugs should land on the vessel.

From the evidence presented at trial, it is apparent that NSCSA was not negligent during the undocking maneuver. At trial, Captain Morey was asked why he did not tell Captain Lusk where to land on the M/V SAUDI DIRIYAH. He responded:

> A Because he understands where he needs to land the tugboat. He is a professional tugboat man. I don't tell him everything to do. I just tell him the general area of where I want him, and they can decide for themselves whether they can get there or not.
>
> Q Is it customary to tell a tugboat captain exactly where to go when you tell them port quarter?
>
> A Not usually, no.

(Morey, tr. 53). Captain Morey had worked with Captain Lusk many times before. He knew Captain Lusk to be an experienced, competent tug pilot. With this knowledge, Captain Morey reasonably assumed that Captain Lusk would place his tug in the proper location. Under these circumstances, Captain Morey was under no duty to instruct Captain Lusk on the proper placement of his tug. Captain Grech reasonably relied upon Captain Morey in this regard.

As for the fuel oil settling tank, it was perfectly understandable for Captain Grech to assume that a tug operator would not rupture the hull of his vessel. He is not required under the law to advise every tug pilot about sensitive portions of his vessel. Furthermore, Captain Lusk is an experienced tug pilot, who has assisted with undocking maneuvers on numerous occasions, including maneuvers involving the M/V SAUDI DIRIYAH and her sister ships. Captain Lusk was aware of the flared hull design of the M/V SAUDI DIRIYAH, and he realized that he should not land his tug so far aft that her stern might make first contact with vessel. Warning instructions from the bridge would not have told him anything which he did not already know.

Moran's claim that NSCSA was negligent because it did not place a "Tugs Here" sign on the side of the M/V SAUDI DIRIYAH must also fail. From the evidence at trial, it appears that some vessels have signs on their sides indicating where a tug should or should not land. The evidence also showed that the vast majority of vessels do not have a sign of this type. Although placing such a warning on the side of the M/V SAUDI DIRIYAH may have been a good idea, no industry standard to this effect exists and NSCSA's failure to place a warning sign does not constitute a lack of due care. A shipowner is not required

under the law to take every precaution imaginable to avoid an accident, it simply must exercise reasonable care, and a shipowner may certainly rely upon the expertise of a tug captain in docking and undocking maneuvers. NSCSA acted reasonably in this case.

C. DAMAGES

1. OPA Damages

Because the collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH was caused solely by the negligence of Moran's agent, Captain Lusk, in performing the undocking maneuver, NSCSA is entitled to recover from Moran, under OPA's contribution provision, the money it spent cleaning up the resulting oil spill and the money it spent compensating victims of the spill. NSCSA proved that it incurred $868,356.80 in removal expenses. In addition, the USCG and the United States Navy have outstanding claims, for approximately $300,000, for their role in the cleanup. Finally, NSCSA spent $106,806.12 to compensate victims of the oil spill. *See* discussion *supra* § I(C). Not including the sums owned to the USCG and the United States Navy, which are not liquidated at this time, NSCSA has proved a total of $975,162.92 in removal and compensation expenses.

Under section 2704 of OPA, however, Moran's liability in this case is limited to $500,000, unless one of the exceptions contained in the act applies. 33 U.S.C. § 2704; *see supra* § II(A). Moran's liability is not limited under OPA, if the oil spill was proximately caused by gross negligence, willful misconduct, or the violation of a federal regulation. 33 U.S.C. § 2704(c). In this case, no evidence was presented suggesting that the collision

was caused by gross negligence or willful misconduct. This is simply a case of ordinary negligence, a failure to exercise reasonable care. NSCSA argues that the collision was caused by Moran's violation of the proper lookout statute, 33 U.S.C. § 2005, and the Vessel Bridge-to-Bridge Radiotelephone Act, 33 U.S.C. §§ 1201-1208; 33 C.F.R. § 26.04. As discussed above, Moran did not violate either of these statutes, and, even if it did violate the Radiotelephone Act, that violation did not cause the collision. *See supra* § II(B). None of the exceptions to liability under section 2704(c) apply in this case; therefore, Moran's liability under OPA is limited to $500,000.

2. Collision Damages

In addition to the damages NSCSA may recover under OPA, NSCSA is also entitled to recover the damages it directly incurred as a result of the collision under general maritime law.[11]

---

11. NSCSA claims it is also entitled to recover its collision damages under the Virginia State Water Control Law, Va. Code Ann. § 62.1-44.34:18(C)(4). Under that law, any person who causes the discharge of oil into state waters is liable to "(a)ny person for injury or damage to person or property . . . caused by such discharge." *Id.* NSCSA argues that it should be allowed to recover for damage to its vessel and for the oil it lost in the spill, because these damages resulted from the discharge of oil from the M/V SAUDI DIRIYAH, which Moran caused. Clearly, the damage to the vessel itself was not caused by the discharge of oil. In fact, the damage occurred before the discharge. NSCSA, therefore, may not recover for the damage to its vessel under the state statute. It is also clear that NSCSA may not recover for its lost oil under the Virginia statute. Strictly speaking, NSCSA's loss of oil resulted from the discharge of oil caused by Moran; however, it was NSCSA's oil. The Virginia law was meant to provide a remedy for those damaged by oil. It was not meant to provide a remedy for those whose oil damaged others. Such an odd application of the statute, as urged by NSCSA, cannot be allowed.

OPA does not regulate recovery of these types of damages. *See* 33 U.S.C. § 2751 ("Except as otherwise provided in this chapter, this chapter does not affect . . . admiralty and maritime law."). The collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH falls within the admiralty jurisdiction of this Court, 28 U.S.C. § 1333; therefore, the rights between the parties, with regard to direct collision damages, must be determined in accordance with the general maritime law. *See East River S.S. Corp.*, 476 U.S. at 864.

The collision was caused solely by the negligence of Captain Lusk. *See* discussion *supra* § II(B). Under its admiralty claim, therefore, NSCSA is entitled to recover the full amount of the damages it incurred as a direct result of the collision. At trial, NSCSA proved that it lost $3,250 in fuel oil and spent $16,050 to repair the hull of the M/V SAUDI DIRIYAH. NSCSA did not prove any economic damages. NSCSA may, therefore, recover $19,300 from Moran under its admiralty claim.

3. Prejudgment Interest

In addition to an award of compensatory damages, NSCSA is entitled to prejudgment interest. NSCSA urges the Court to apply the prejudgment interest provisions contained in OPA. Under section 2705, a "responsible party . . . is liable to a claimant for interest on the amount paid in satisfaction of a claim under this chapter." 33 U.S.C. § 2705(a). The period for which interest is measured begins when the claimant presents his claim to the responsible party and ends on the date the claim is paid. 33 U.S.C. § 2705(b)(1). Interest is "calculated at the average of the highest rate for commercial and finance company paper of maturities of 180 days or less obtaining on each of the days included within the period for which interest must be paid to

the claimant, as published in the Federal Reserve Bulletin." 33 U.S.C. § 2705(b)(4). Section 2705, however, is not applicable to this case. By its terms, section 2705 only applies to cases under OPA brought by a claimant against a responsible party. 33 U.S.C. § 2705(a). It does not apply to actions under OPA's contribution provision brought by a responsible party. Because OPA does not define the amount of prejudgment interest recoverable in this contribution action, the Court will look to general maritime law.

"Throughout our history, admiralty decrees have included provisions for prejudgment interest." *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 115 S. Ct. 2091, 2095 (1995). Because an injured party is to be completely compensated for its loss, the general rule in maritime collision cases is that prejudgment interest should be awarded. *Id.* Only when a case presents "peculiar" or "exceptional" circumstances will an award for prejudgment interest be denied. *Id.* at 2095-97 (holding that neither a good faith argument as to liability nor the mutual fault of the plaintiff and the defendant justifies denial of prejudgment interest). No peculiar or exceptional circumstances arose in this matter; therefore, NSCSA is entitled to prejudgment interest on its award.

In admiralty cases, computation of an award for prejudgment interest is within the sound discretion of the district court. *Ameejee Vallejee and Sons v. M/V Victoria U.*, 661 F.2d 310, 313 (4th Cir. 1981). Thus, the district courts are not bound by the maximum rate of prejudgment interest allowable under state law. *Id.* Instead, the district courts have been urged to follow the prevailing commercial interest rates, when determining an appropriate award. *Id.* at 314.

In accordance with these principles, the Court finds that NSCSA is entitled to recover from Moran interest on $519,300,[12] at a rate of 8.25%,[13] from March 17, 1995, the date NSCSA served its complaint, to date of judgment entry.

D. MORAN'S COUNTERCLAIM

Moran Towing of Virginia filed a counterclaim against NSCSA on April 10, 1995, alleging that the collision between the HARRIET MORAN and the M/V SAUDI DIRIYAH and the resulting oil spill were caused by the negligence of NSCSA.

---

12. NSCSA argues that it should be awarded prejudgment interest on the full amount of its damages, rather than on the reduced amount to which it is entitled under OPA's limitation provision. Because an award of prejudgment interest on the full amount NSCSA's damages would violate the reasoning underlying an award of prejudgment interest, it is not surprising that NSCSA was unable to cite any case in support of its position.

The purpose of prejudgment interest is to fully compensate the victim of a collision. *Cement Div., Nat'l Gypsum Co.*, 115 S. Ct. at 2095. Due to the time-consuming nature of litigation, it often takes months or even years for an injured person to receive what he is entitled to under the law. Recognizing the time-value of money, admiralty law allows a plaintiff to recover prejudgment interest on his award. The rationale behind this method of compensation would not apply if the plaintiff were awarded prejudgment interest on the full amount of his damages rather than on the amount to which he is entitled to judgment under the law. Such an award would go beyond compensation, and, instead, provide a windfall.

13. Eight and one quarter percent is the current prime rate offered by banks in this area on loans to businesses. The Court finds that this is an appropriate rate at which to compute NSCSA's pre-judgment interest award. *See Ameejee Vallejee and Sons*, 651 F.2d at 314 (urging district courts to assess prejudgment interest at prevailing commercial rates).

Moran bases its claim on contribution and indemnification theories. As stated above, the collision was caused solely by the negligence of Moran. *See supra* § II(B). As to Moran's counterclaim, therefore, the Court finds in favor of NSCSA and DIRECTS entry of judgment to this effect.

E. MORAN'S MOTION FOR SANCTIONS

On November 28, 1995, Moran filed a motion, requesting that the Court sanction NSCSA for failing to deliver the original course recorder tracing, bell book, and automatic bell logger from the M/V SAUDI DIRIYAH. NSCSA did not release these documents as requested by Moran in a request for production of documents. At a hearing on Moran's Motion to Compel, Magistrate Judge Tommy E. Miller ordered NSCSA to produce the original course recorder tracing by September 25, 1995, or to explain what efforts have been made to recover the tracing. In NSCSA's response to Moran's Motion to Compel, counsel for NSCSA explained that, despite their exhaustive efforts to find the original course recorder tracing, they had been unable to locate the document. NSCSA further stated that no bell book or automatic bell logger exists for the night of December 1, 1993.

After hearing the evidence presented in this case, it is clear to the Court that NSCSA did not violate any rules of discovery. NSCSA presented uncontradicted evidence at trial that Captain Grech made a copy of the original course recorder tracing when the USCG boarded his vessel during the night of the spill; that Captain Grech gave a copy of the tracing to the USCG that night; that counsel for Moran were provided this same copy of the tracing; and that no one at this time is aware of what became of the original tracing. NSCSA, therefore, was unable to produce the original tracing in response to Moran's request.

Appendix B

The evidence also revealed that the automatic bell logger of the M/V SAUDI DIRIYAH was not operational on the night of the spill; therefore, no record from that machine would have been responsive to Moran's request. Finally, Captain Grech testified that no handwritten bell book was kept by the crew that night. One crew member, Tariqu Mohammed Osman, testified that typically when the automatic bell logger is not operational, a handwritten bell book is kept. He had no specific recollection, however, whether the automatic bell logger was operational on the night of the spill or whether a handwritten bell book was kept that night. Captain Grech was a credible witness, and Moran produced no evidence which would cause the Court to disregard his testimony. The Court, therefore, finds as a fact that no handwritten bell logger exists from the night of the spill. Obviously, therefore, NSCSA could not provide any document in response to Moran's request for the bell book.

Moran's Motion for Sanctions is not supported by any substantial evidence, but, rather, is based on distrust and speculation. Moran's Motion for Sanctions, therefore, is **DENIED.**

III. CONCLUSION

For the foregoing reasons, the Court DIRECTS the Clerk to enter judgment for Plaintiff against all Defendants in the amount of $519,300 plus costs and interest at a rate of 8.25% from March 17, 1995, until the date of judgment. The Clerk is further DIRECTED to enter judgment in favor of Plaintiff on the counterclaim filed by Moran Towing of Virginia, Inc., and on Defendants' Motion for Sanctions.

Finally, the Clerk is DIRECTED to send a copy of this Opinion to all counsel of record.

It is so ORDERED.

s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
April 25, 1996

APPENDIX C — FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED MAY 29, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ACTION NO. 2:95cv258

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA (NSCSA),

Plaintiff,

v.

MORAN MID-ATLANTIC CORPORATION, *in personam*, MORAN TRADE CORPORATION OF DELAWARE, *in personam*, MORAN TOWING OF VIRGINIA, INC., a division of MORAN MID-ATLANTIC CORPORATION, *in personam*, and M/V HARRIET MORAN, her engines, tackle, apparel, etc., *in rem*,

Defendants.

FINAL ORDER

On April 25, 1996, the Court issued findings of fact and conclusions of law which decided the controversy between Plaintiff and Defendants. Plaintiff filed a motion to amend the Court's judgment, pursuant to Rule 59 of the Federal Rules of Civil Procedure, on May 9, 1996. On May 17, 1996, Defendants filed a brief in opposition to Plaintiff's motion. Plaintiff submitted a reply brief on May 22, 1996. The motion is now ripe for disposition.

Appendix C

Plaintiff asserts three grounds in support of its motion to amend judgment: (1) the Court should have issued a declaratory judgment, stating that Plaintiff is entitled to recover from Defendants any money it pays to compensate the United States Navy and the United States Coast Guard for expenses they incurred in helping to clean-up the oil spill; (2) the Court failed to consider the fact that Plaintiff incurred $149,700.46 in liability to third parties under a lawsuit filed in state court pursuant to the Virginia Water Control Law, and that this liability affects the Court's ruling on the issue of limitation of liability; and (3) the Court erred when it found that Plaintiff had not proven the amounts it paid to Turnaboat Services, Ltd. ("Turnaboat") for adjustment of third party claims. The Court finds that none of these grounds warrant amendment of its earlier ruling.

Plaintiff's first argument is that the Court should have issued a declaratory judgment, under section 2717(f)(2) of the Oil Pollution Act of 1990 ("OPA"), stating that Plaintiff is entitled to recover amounts which it will later pay to the Navy and to the Coast Guard for the expenses incurred during the clean-up. Plaintiff concedes that such a declaration is moot given the Court's ruling that Plaintiff's damages regarding clean-up of the oil spill and compensation of third parties is limited by OPA to $500,000.00. Because a declaratory judgment regarding the Navy and Coast Guard expenditures is moot, no amendment of judgment is appropriate on this basis.

The next argument which Plaintiff makes in support of its motion is that the Court failed to consider liability Plaintiff incurred to the Tidewater Yacht Agency, Gordon W. Shelton, III, and Katherine Z. Shelton under the Virginia State Water Control Law. Plaintiff insists that the Court's ruling regarding limitation of liability cannot stand because a judgment has been entered pursuant to the state statute against Plaintiff in favor of

these third parties. Plaintiff's argument fails for two reasons. First, the record in devoid of evidence regarding Plaintiff's liability to Tidewater Yacht and Mr. and Mrs. Shelton. In fact, counsel for both parties represented to the Court that their liability under the state lawsuit filed by Tidewater Yacht and Mr. and Mrs. Shelton would be handled under an agreement between the parties:

> Mr. Coberly: We have an agreement that as counsel for Saudi Lines and for Moran, in that case [the Tidewater Yacht case] where we are both codefendants, that we would handle the result of that case in connection with whatever verdict was obtained in this case, in terms of fitting it in, whether it is limitation or whether it is proportionate fault, what have you.
>
> * * * *
>
> Mr. Coberly: I believe it is appropriate that it not be a part of the judgment in this case.
>
> Mr. Crumpler: I think that's right. We have an agreement between the parties on that, an it will be taken care of by the agreement.

Transcript at 333-34. Because the parties had an agreement as to this matter, no evidence regarding Plaintiff's liability to Tidewater Yacht and Mr. and Mrs. Shelton was offered to or received by the Court.

Second, even if Plaintiff had proven that it was liable for $149,700.46 to Tidewater Yacht and Mr. and Mrs. Shelton under the Virginia Water Control Law, this fact would not alter the

Court's ruling on the question of limitation of liability. The Court's ruling on that issue hinged on the fact that Plaintiff's liability under the state statute was not in excess of its liability under OPA. Plaintiff's liability under OPA is limited to $15,021,600. *See* 33 U.S.C. § 2704(a). Adding $149,700.46 to the other elements of damages which NSCSA proved at trial, Plaintiff's total liability from this spill still falls well short of its liability cap under OPA. Therefore, even if Plaintiff had proven its liability to these third parties, the Court's ruling regarding limitation of liability would remain the same.

Finally, Plaintiff argues the Court erred in finding that Plaintiff did not prove its damages regarding money paid to Turnaboat for adjusting services. Plaintiff offers nothing new on this point except additional argument. The Court finds Plaintiff's position unpersuasive. As discussed in the April 25, 1996, Opinion, the Court is unable to determine from the evidence presented during the course of the trial which portions of Turnaboat's fees are recoverable. Plaintiff, therefore, failed to carry its burden of proving this element of damages.

For the foregoing reasons, Plaintiff's motion to amend judgment is **DENIED.**

The Clerk is DIRECTED to send a copy of this Final Order to all counsel of record.

It is so ORDERED.

s/ Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
May 29, 1996

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION FILED SEPTEMBER 18, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 2:95cv258

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA (NSCSA),

Plaintiff,

v.

MORAN TOWING OF VIRGINIA, INC., a division of MORAN MID-ATLANTIC CORPORATION, *in personam*, MORAN TRADE CORPORATION OF DELAWARE, *in personam*, and M/V HARRIET MORAN, her engines, tackle, apparel, etc., *in rem*,

Defendants.

ORDER

This matter comes before the Court on the Motion of Plaintiff for reconsideration or clarification of this Court's Order of August 14, 1995. In that Order, this Court granted Defendant's Motion to Dismiss Count II of Plaintiff's Complaint, to the extent that it requested dismissal of the Plaintiff's claim for response costs and third-party property settlement claims pursuant to the Virginia State Water Control Law.

Appendix D

The Court has received and carefully reviewed Plaintiff's Motion for Reconsideration or in the Alternative for Clarification, Plaintiff's supporting memorandum, Defendants' opposing memorandum, and Plaintiff's Reply memorandum. The Court is of the opinion that nothing new which is relevant to the issue addressed in the Court's Order of August 14, 1995 has been stated. However, in order to clarify the August 14, 1995, the Court reiterates that it ORDERED the dismissal of Plaintiff's Count II, to the extent that it requested relief pursuant to the Virginia Water Control Act. The Court did not dismiss the additional common law claims which Plaintiff added to Count II in its Second Amended Complaint, nor did this Court rule that the doctrine of subrogation is unavailable as an independent theory of recovery. The Virginia Water Control Act, however, does not itself create the right to subrogation.

Accordingly, the Motion to Reconsider is **DENIED.**

The Clerk is DIRECTED to send a copy of this Order to counsel for the Plaintiffs and Defendants.

IT IS SO ORDERED.

s/ illegible
United States District Judge

Norfolk, Virginia
September 18, 1995

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION FILED AUGUST 14, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 2:95cv258

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA (NSCSA),

Plaintiff,

v.

MORAN TOWING OF VIRGINIA, INC., a division of MORAN MID-ATLANTIC CORPORATION, *in personam*, MORAN TRADE CORPORATION OF DELAWARE, *in personam*, and M/V HARRIET MORAN, her engines, tackle, apparel, etc., *in rem*,

Defendants.

ORDER

This matter is before the Court on the Defendant's Motion to Dismiss Count II and part of Count III of Plaintiff's original Verified Complaint. For the-reasons set forth below, Defendant's Motion to Dismiss Count II of Plaintiff's Verified Complaint, which Count is also contained in the Second Amended Complaint, to the extent that it requests dismissal of the Plaintiff's claim for response costs and third-party property settlement claims, is **GRANTED.** As to Defendant's Motion to

Dismiss the portion of Count III claiming relief under the Clean Water Act, the Court **FINDS** this portion of the Plaintiff's Complaint to have been abandoned, thus requiring no further action by this Court.

I. BACKGROUND

On March 17, 1995, the Plaintiff, National Shipping Company of Saudi Arabia (NSCSA), brought this action against Moran Mid-Atlantic Corporation, Moran Trade Corporation of Delaware, Moran Towing of Virginia, Inc., each *in personam*, and the M/V HARRIET MORAN, *in rem*, (referred to collectively as Moran) to recover $1.8 million in costs it had expended in cleaning up, mitigating, and settling property damage claims arising from the effects of an oil spill. The incident occurred on the evening of December 1, 1993, while the M/V SAUDI DIRIYAH, owned and operated by the Plaintiff, was being assisted by two tugs owned by Moran Delaware and operated by Moran Mid-Atlantic. In maneuvers incident to moving the M/V SAUDI DIRIYAH from Norfolk International Terminals to Lambert's Point Docks with the assistance of the tugs, one of the tugs, the M/V HARRIET MORAN, collided with the M/V SAUDI DIRIYAH, breaching the hull and rupturing the vessel's fuel settling tank. This collision resulted in an extensive discharge of No. 4 fuel oil into the Elizabeth River and nearby marinas. At the time of the incident, NSCSA promptly assumed responsibility for the response. NSCSA requested Moran to assume responsibility for the cleanup, but this request was denied. The parties still dispute who was at fault.

In its Complaint, NSCSA asserts three different theories of recovery. First, NSCSA claims that Moran is liable to them for

breach of maritime contract and negligence under federal maritime law. Second, NSCSA alleges that it can recover damages and attorney's fees from Moran pursuant to the State Water Control Law, Va. Code. Ann. § 62.1-44.2 *et seq.* (Michie 1992). Third, NSCSA claims reimbursement from Moran pursuant to the provisions of the Oil Pollution Act of 1990 (OPA), 33 U.S.C. § 2701 *et seq.* (Supp. II 1990) and the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 *et seq.* (1988 & Supp. II 1990).

On June 15, 1995, pursuant to Rule 12(b)(6), Moran filed a Motion to Dismiss both NSCSA's Second Cause of Action and the portion of NSCSA's Third Cause of Action claiming recovery under the Clean Water Act. On June 21, 1995, NSCSA filed a Motion to Amend its Verified Complaint. The Amended Verified Complaint more clearly and specifically sought recovery for the damages it had sustained to its own property, as well as recovery for response and third-party settlement costs. NSCSA filed a Brief in Opposition to Moran's Motion to Dismiss on July 3, 1995, and Moran filed a Reply to NSCSA's Memorandum in Opposition to its Motion on July 7, 1995. A hearing on the Motion to Dismiss Count II and part of Count III was set for July 28, 1995.

On July 17, 1995, NSCSA filed a Motion for Leave to File a Second Amended Complaint and a Memorandum in Support of the Motion. In Count II of its Second Amended Complaint, NSCSA still requested recovery for response and third-party settlement costs, the claims which are the subject of Moran's Motion to Dismiss, but also asserted additional common law claims. In Count III of the Second Amended Complaint, NSCSA more fully explained its claims under OPA while dropping its claims under the Clean Water Act. On July 24, 1995, Moran

filed a Memorandum in Opposition to Plaintiff's Motion for Leave to File Second Amended Complaint. This Motion was also set to be argued on July 28, 1995.

A hearing on the Plaintiff's Motion for Leave to File a Second Amended Complaint and Defendant's Motion to Dismiss was held on July 28, 1995, at which time the Court heard oral arguments. The Court GRANTED Plaintiff's Motion to File an Amended Complaint and deemed it filed on July 28, 1995. The Court also allowed the Defendants time to file additional motions on the Second Amended Complaint.

At the hearing, NSCSA presented further authorities to the Court in support of its Opposition to the Motion to Dismiss. The Court gave the Defendants 10 days in which to respond to these additional authorities. On August 7, 1995, Moran informed the Court that it would not submit a response. Thus, the matter is now ripe for adjudication.

Moran, in its brief and oral arguments, asserts (1) that the State Water Control Law does not provide NSCSA a cause of action for reimbursement of response costs or payment of third party claims; and (2) that NSCSA does not have a remedy under the Clean Water Act because where OPA provides a remedy for such an incident, the Clean Water Act does not apply. The Court agrees with Moran.

II. MOTION TO DISMISS — COUNT II

A. Standard

In ruling on a Motion to Dismiss for failure to state a claim upon which relief can be granted, the complaint is construed in

the light most favorable to the plaintiff and his allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bruce v. Riddle*, 631 F.2d 272, 273-74 (4th Cir. 1980). A court should not dismiss a complaint even if it appears on the face of the pleadings that the chance of recovery is very remote. *Scheuer*, 416 U.S. at 236.

B. Virginia Code Section 62.1-44.34:18(D)

NSCSA is correct in asserting that § 62.1-44.34:18(D) addresses the rights of persons to request reimbursement for costs of cleanup. Va. Code Ann. § 62.1-44.34:18(D) (Michie 1992). The language of this code provision states:

> Nothing in this article shall affect the right of any person who renders such assistance to reimbursement for the costs of the containment and cleanup *under the applicable provisions of this article or the Federal Water Pollution Control Act, as amended, or any rights that person may have* against any third party whose acts or omissions caused or contributed to the prohibited discharge of oil or threat of such discharge.

Id. (emphasis added). Thus, the General Assembly has made it clear in section (D) that nothing in Article 11 of the State Water Control Law prevents either (1) a person from collecting containment and cleanup costs where that person has an existing right under the State Water Control Law or the Clean Water Act/ Oil Pollution Act or (2) a person from asserting any other rights

that he "may have" against any liable third parties. The language of this statutory section plainly indicates that it applies in order to prevent any loss of rights the person may already have under the statute, the Clean Water Act or OPA, or any other statute or common law. Section (D), however, contrary to NSCSA's contention, does not in and of itself create a new cause of action; rather it prevents the State Water Control Law from being read to disallow pre-existing ones.

Consequently, in order for NSCSA to survive Moran's Motion to Dismiss its claim for response and settlement of third-party costs in Count II of its original Verified Complaint, NSCSA's complaint must state an independent statutory or common law source for its right to reimbursement. If NSCSA does have an independent source for its claim, section (D) will save the claim from being disallowed in any way by the State Water Control Law.

C. Virginia Code Section 62.1-44.34:18(C)(4)

NSCSA asserts that § 62.1-44.34:18(C)(4) furnishes it with an independent basis for its claim for reimbursement from Moran. Va. Code Ann. § 62.1-44.34:18(C)(4) (Michie 1992). Section (C) states:

> Any person discharging or causing or permitting a discharge of oil into or upon state waters . . . shall be liable to:
>
> . . . .
>
> (4) Any person for injury or damage to person or property, real or personal, loss of income, loss of

> the means of producing income, or loss of the use of the damaged property for recreational, commercial, industrial, agricultural or other reasonable uses, caused by such discharge.

Id. NSCSA proposes three theories which would entitle it to recover response costs and the costs associated with the settlement of third-party claims under this section. NSCSA believes that it can recover the response and settlement costs as either (1) loss of income; (2) property damage; or (3) economic or pecuniary losses.

1. NSCSA's "loss of income" argument

NSCSA argues that its expenditures in cleaning up, investigating, and containing the oil spill and its payments to third-party claimants should be encompassed within the statutory phrase "loss of income." The rule is that "[t]he plain meaning of a statute should be rejected only if there is substantial, unambiguous evidence supporting a contrary interpretation." *Salomen Forex, Inc. v. Tauber*, 795 F. Supp. 768 (E.D.Va. 1992), *aff'd*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540, *reh'g denied*, 114 S. Ct. 2156 (citing *Matala v. Consol. Coal Co.*, 647 F.2d 42, 430 (4th Cir. 1981)). Interpreting "loss of income" to include expenditures would clearly be a misreading of the plain language of the statute.

Furthermore, in section (C)(1) of this statute, the General Assembly gave the Commonwealth of Virginia the right to recover "all costs and expenses of investigation, containment and cleanup incurred." Va. Code Ann. § 62.1-44.34:18(C)(1) (Michie 1992). Hence, the legislature knew how to create a cause of action for removal costs, and had it intended removal costs

to be recoverable by persons utilizing section (C)(4), it would have explicitly provided for them.

For these reasons, the Court finds that the section (C)(4) language "loss of income" a does not include removal costs or third-party settlement costs.

2. NSCSA's "property damage" argument

NSCSA also contends that their response costs and their third-party settlement costs should be included within the statutory provision allowing recovery for "damage to property." This interpretation of the property damage provision would also be a misreading of the statute. Clearly, the General Assembly intended this language to provide a remedy to recover injuries to a person's real or personal property which had been injured, fouled, or damaged by the oil spill. This would presumably include such property as boats, docks, and contaminated soil. It would not, however, include such expenses as third-party settlement claims or response or removal costs, unless the removal costs were incurred while removing the spilled oil from the complainant's personal or real property.

Moreover, as stated above, because the language of the statute explicitly allows the Commonwealth of Virginia to recover response, cleanup and containment costs, but does not similarly provide this remedy for private persons, the Court finds that this is a clear indication that these additional remedies cannot be read into the remedies already granted to private persons in the statute. Thus, NSCSA cannot rely on the "damage to property" language in order to recover its response and its third-party settlement costs.

3. NSCSA's "economic or pecuniary losses" argument

Finally, NSCSA claims that it should be able to recover its response and third-party settlement costs as "economic or pecuniary losses." NSCSA relies on *Adams v. Star Enter.*, 51 F.3d 417 (4th Cir. 1995), to support its contention. In that case, property owners sought damages for an oil spill that had not as yet contaminated their land, but which had allegedly decreased the value of their property. *Id.* at 421. The Fourth Circuit held that the "injury to property" language of § 62.1-44.34:18(C)(4) should be read "to require some physical injury to the plaintiff's property" and not to solely allow mere economic losses. *Id.* at 425 (citing *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1195 (4th Cir. 1985)). The *Adams* case is quite different from the case at hand. Here, NSCSA is attempting to use section (C)(4) to recover for response and third-party settlement costs, as well as for physical injury to NSCSA's property.[1] Although section (C)(4) may allow NSCSA to recover for economic or pecuniary losses associated with actual physical injuries to its own property, the statute does not allow NSCSA to recover for either response costs which are not related to its own physical injuries or for third-party settlement costs. Thus, the Court finds that section (C)(4) does not provide NSCSA a cause of action to recover, as "economic or pecuniary losses," the response and settlement costs it seeks in Count II of its Verified Complaint.

D. Conclusion

Applying the above-mentioned standard[2] to the present case,

---

1. The Second Amended Complaint specifically claims actual physical property damages to NSCSA's own property. Pl.'s Second Am. Verified Compl. at ¶54.

2. *See supra* part II.A.

the Court finds that, in its request for reimbursement of its response and third-party settlement costs pursuant to Va. Code Ann. § 62.1-44.34:18 (Michie 1992), NSCSA has failed to state a claim for which relief can be granted. NSCSA has provided no cause of action which would allow for a recovery of response and third-party settlement costs under this statute.

The Court notes that it does not rule as to whether NSCSA has a claim under the State Water Control Act against Moran as to damages to NSCSA's own property. This claim was more definitely pleaded in NSCSA's Second Amended Complaint, and the time for Moran to file an answer has not yet expired.

Accordingly, the Motion to Dismiss Count II of the Second Amended Complaint, to the extent that it requests the recovery of money expended by NSCSA for response and third-party property settlement costs, is **GRANTED.**

III. MOTION TO DISMISS — COUNT III

In its Brief in Opposition to the Motion by Moran to Dismiss, NSCSA did not address the part of Moran's Motion which requested dismissal of the original Complaint's Count III cause of action made pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1988 & Supp. II 1990). In addition, in its Second Amended Complaint, NSCSA omitted its claim under the Clean Water Act, and at the July 28 hearing NSCSA conceded that its claim under the Clean Water Act was improper. Furthermore, the Clean Water Act states that where liability is established under § 2701 of the Oil Pollution Act, claims under § 1321(g) and (h) of the Clean Water Act will not apply.[3] Thus,

---

3. *See* Pub. L. No. 101-380, § 2002, 104 Stat. 484 (1990) (codified at 33 U.S.C. § 1321, Statutory Note).

for the above-stated reasons, the Court FINDS that NSCSA's claim under the Clean Water Act has been abandoned for good cause and no further ruling is necessary.

IV. CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss Count II, which Plaintiff pleaded in the Verified Complaint and reasserted in the Second Amended Complaint, to the extent that it requests the recovery of money expended by NSCSA for response and third-party property settlement costs pursuant to the Virginia State Water Control Law, is **GRANTED.**

The Clerk is DIRECTED to mail a copy of this Order to counsel for Plaintiff and counsel for Defendant.

IT IS SO ORDERED.

s/ illegible
United States District Judge

Norfolk, Virginia
August 14, 1995

APPENDIX F — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED OCTOBER 6, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1741
CA-95-258-2

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA

Plaintiff - Appellant

v.

MORAN TRADE CORPORATION OF DELAWARE, in personam; MORAN TOWING OF VIRGINIA, INCORPORATED, a division of Moran Mid-Atlantic Corporation

Defendants - Appellees

No. 96-1824
CA-95-258-2

NATIONAL SHIPPING COMPANY OF SAUDI ARABIA

Plaintiff - Appellee

v.

MORAN TRADE CORPORATION OF DELAWARE, in personam; MORAN TOWING OF VIRGINIA, INCORPORATED, a division of Moran Mid-Atlantic Corporation

Defendants - Appellants

Appendix F

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc and motion to supplement the record were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc and motion to supplement the record are denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
FEB 11 1998
CLERK

No. 97-1149

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA,

Petitioner,

v.

MORAN TRADE CORPORATION OF DELAWARE,
MORAN TOWING OF VIRGINIA, A DIVISION OF
MORAN MID-ATLANTIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MARK T. COBERLY
PATRICK A. GENZLER
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, Virginia 23510
(757) 446-8600
Attorneys for Respondents.

Washington, D.C. • THIEL PRESS • (202) 328-3286

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Respondent disagrees with Petitioner's Statement of Questions Presented for Review in that the District Court and Fourth Circuit opinions did not hold that there was preemption of state statutory and common law remedies by OPA 90. This was not a preemption case, but rather an interpretation and application of federal and state statutes to the specific facts of this maritime collision and resultant oil spill.

Page

TABLE OF CONTENTS

Counter-Statement of the Questions Presented i

Counter-Statement of District Court Jurisdiction 1

Counter-Statement Of The Case 1

Reasons For Denying The Petition 3

I. There Is No Conflict Among The Circuits On The Interpretation Of OPA 90. 4

II. The Decision Below Has Not Generated Confusion Among Shipowners Or The Courts 7

III. OPA 90 Is a Comprehensive Statutory Scheme Which Was Properly Interpreted By The Lower Courts. 10

A. OPA 90 Is a Comprehensive Scheme for Oil Pollution Damages 10

B. Moran's Limit of Liability is $500,000 Under OPA 90. 14

C. OPA 90 Does Not Create State Common Law Remedies That Are Preempted by Federal Maritime Law in a Marine Collision Suit 14

Conclusion 18

APPENDICES:

Appendix A – Excerpt from Second Amended Verified Complaint A-1

Appendix B – Unpublished per curiam Opinion of the United States Court of Appeals for the Fourth Circuit Decided September 9, 1997 . . . . . A-3

TABLE OF AUTHORITIES

Page

Cases:

Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994) 3, 6

Berman Enterprises, Inc. v. Jorling, 793 F. Supp. 408 (E.D.N.Y. 1992), *aff'd*, 3 F.2d 602 (2d Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994) 6

Cement Division, Nat'l Gypsum Co. v. City of Milwaukee, 950 F. Supp. 904 (E.D. Wis. 1996) 8

Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982) 15

Frederick E. Bouchard, Inc. v. United States, 583 F. Supp. 477 (D. Mass. 1984) 12

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 6

In re Oswego Barge Corp., 664 F.2d 327, 340, *reh'g denied*, 673 F.2d 47 (2d Cir. 1981) 12

Intertanko v. Lowry, 947 F. Supp. 1484 (W.D. Wa. 1996) 6

Maryland Department of Natural Resources v. Kellum, 51 F.3d 1220, 1224 (4th Cir. 1995) 15

Meaige v. Hartley Marine Corp., 925 F.2d 700, 702 (4th Cir. 1991), *cert. denied*, 501 U.S. 1217 (1991) 15

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996) 18

Cases, continued: Page

Middlesex County Sewerage Authority v. National Sea Clammers Assn., 453 U.S. 1, 14 (1981) 17

Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990) 13

Mullenix v. United States, 984 F.2d 101, 104 (4th Cir. 1993) 15

Steuart Transportation Co. v. Allied Towing Corp., 596 F.2d 609 (4th Cir. 1979) 11, 16

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979) 18

United States v. Dixie Carriers, Inc., 627 F.2d 736, 738 (5th Cir. 1980) 12

Statutes:

28 U.S.C. §1331 (1994) 1

28 U.S.C. §1332 (1994) 1

28 U.S.C. §1333 (1994) 1

33 U.S.C. §407 (1994) 11

33 U.S.C. §1251 (1994) 1

33 U.S.C. §1321 (1994 and Supp. 1996) 9, 11, 12

33 U.S.C. §§2001, et seq. (1994) 15

33 U.S.C. §2701 (1994) 1

33 U.S.C. §2702 (1994) 4, 10, 12-14

33 U.S.C. §2704 (1994 and Supp. 1995) 4, 9, 14, 16

33 U.S.C. §2709 (1994) 4, 13

Statutes, continued: Page

33 U.S.C. §2718 (1994) 3, 5, 15
33 U.S.C. §2751 (1994) 14, 16
42 U.S.C. §6901 (1994) 16
46 U.S.C. §183 (1994 and Supp. 1996) 11

Congressional Reports:

H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess., *reprinted in* 1990 U.S. Code Cong. & Admin. News 781 11
S. Rep. No. 94, 101st Cong., 2d Sess., *reprinted in* 1990 U.S. Code Cong. & Admin. News 746 10

Regulations:

33 C.F.R. §130. 9
33 C.F.R. §155.1010 9

Rules:

Rule 10, Rules of the United States Supreme Court. 4

COUNTER-STATEMENT OF DISTRICT COURT JURISDICTION

Petitioner asserts that Jurisdiction in the District Court was grounded on 28 U.S.C. §§ 1331, 1332 and 1333. This statement is correct as to §1331 and §1333, however §1332, diversity jurisdiction, was never alleged as a basis of jurisdiction nor did the District Court find jurisdiction on that basis. The Petitioner, National Shipping Company of Saudi Arabia ("NSCSA"), filed this action in federal court as ". . . an admiralty and maritime claim within the meaning of 28 U.S.C. §1333 (1994) and Rule 9(h) of the Federal Rules of Civil Procedure," and under the Oil Pollution Act of 1990 (OPA 90) 33 U.S.C. §§2701 *et seq.*[1]

The District Court recited the basis for jurisdiction in its decision: "This matter falls within the Court's federal question and admiralty jurisdiction. See 28 U.S.C. §§1331 and 1333."[2]

COUNTER-STATEMENT OF THE CASE

Respondent agrees with the facts set forth in petitioner's Statement of the Case, ("B - Procedural History"), except as set forth below.

NSCSA sought in its Complaint, as later amended, to recover from Respondent under five theories: (1) general maritime law, (2) Virginia State Water Control Law, (3) Virginia common law, (4) OPA 90 and (5) the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1251

[1] Second Amended Verified Complaint, Appendix p. A-1. *Note* that references to the Appendix to the Brief in Opposition are designated as hyphenated page numbers. References to the Appendix to the Petition follow the same page designations as used by Petitioner, *e.g.* "1a".

[2] Opinion of District Court, Appendix B, p. 29a.

et seq. Respondent filed a Motion to Dismiss the claims under the Virginia State Water Control Law and under the FWPCA on the basis that neither Act by its own terms could provide Petitioner a cause of action against Respondent to recover the response costs it incurred. The District Court agreed and dismissed these two statutory claims by its order and opinion of August 14, 1995. Appendix E, p. 62a.

The remainder of the case was tried in January 1996 and the Court issued its Opinion on April 25, 1996. The District Court found Moran liable for the collision, but held that the limitation provisions of OPA 90 limited Petitioner's recovery to approximately half of the proven damages – $500,000. In its Opinion, the District Court did not revisit the state pollution statute except to observe that the claims based upon the statute had been dismissed.[3] In considering the claims asserted under state common law, the Court found that Petitioner as the owner of a spilling vessel was not in the class of victims that OPA was designed to benefit, and that under these facts where Petitioner's entire liability and damages were circumscribed by OPA 90 and its own limitation amount had never been exceeded, that state common law was not available to avoid the limitation set by OPA for a third party.

Most importantly though, this is not a case of preemption of state law. The District Court never said state law was preempted by OPA 90 as Petitioner asserts. Rather, the District Court's ruling was dictated by the unique facts of this case. The District Court held only that this plaintiff, whose vessel spilled the oil and who thereby is strictly liable, under this set of facts where plaintiff's

---

[3] Opinion of District Court, Appendix B, p. 34a.

liability arose solely from the provisions of OPA 90, may not avoid the third party limitation provisions of OPA 90 by claiming under state common law unless state common law claims asserted against it exceed its own OPA limitation amount. The District Court never ruled that state law was preempted by OPA 90, and its Opinion of April 25, 1996 never considered state statutory law.

The Fourth Circuit affirmed *per curiam.*

REASONS FOR DENYING THE PETITION

The Petitioner seeks a Writ of Certiorari on the basis of what it terms was the "implied finding" of the District Court that the Petitioner was preempted from asserting state and common law claims on the basis of OPA 90. It argues that this Court should grant review for essentially three reasons. First, the decision conflicts with the plain language of section 2718 of OPA 90. (Petition at p. 7). Next, it argues that the decision conflicts with the holding of the First Circuit Court of Appeals in *In re Ballard Shipping.*[4] (Petition, p. 7). And finally, that the decision creates confusion for shipowners. (*Id.* pp. 9-10, 13). None of these grounds are substantiated in the record. For the reasons set forth in greater detail below, this Court should deny review.

---

[4] *Ballard Shipping Co. v. Beach Shellfish,* 32 F.3d 623 (1st Cir. 1994).

I.
THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE INTERPRETATION OF OPA 90.

The Rules of the United States Supreme Court outline in Rule 10 the considerations that will serve as a guide for considering a petition for a writ of certiorari.[5] The principal considerations are whether there are conflicts among the circuits on the particular issue, whether a federal circuit court has decided a significant question of federal law that conflicts with rulings by this Court, and whether the Supreme Court's action on the matter is required by virtue of its supervisory role over the federal judiciary. Respondent submits that none of these criteria can be applied to the instant matter to justify a review of the Fourth Circuit decision by this Honorable Court.

There is no conflict among the circuits inasmuch as this is the only District Court and Circuit Court to interpret the contribution and limitation provisions of the Oil Pollution Act of 1990.[6] To the extent other circuits

---

[5] Rule 10 lists the following as representative of "the character of the reasons the Court considers:

(a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

[6] 33 U.S.C. §§2702, 2704, 2709 (1994).

have interpreted §2718, it has never been in the context of limitation, contribution, common law or from the unique factual standpoint of the present case.

The petitioner frequently refers to the issue of preemption of "state law or common law," which insinuates state *statutory* law and common law. However, the state statutory pollution law was interpreted by the District Court on motion, and the Petitioner's claim dismissed based on the language of the state statute, not by preemption, by Judge Clarke's order of August 14, 1995.[7]

In the April 25, 1996 post-trial Opinion, District Court Judge Smith stated plainly that state statutory law was not an issue before her:

> This Court has already ruled, in its Order granting in part Moran's Motion to Dismiss, that NSCSA may not recover its response costs and amounts paid to third parties under Virginia State Water Control law. The only claims left to be considered, therefore, are those brought pursuant to *Virginia common law.*

Opinion of District Court, Appendix B, p. 34a. (emphasis added).

And, while the Court recognized at the beginning of its Opinion that the August 14, 1995 Order preserved to NSCSA the right to recover pollution damage sustained to its own property under the Virginia Water Control law, NSCSA did not offer any evidence on that point.[8] The District Court held, and the Fourth Circuit affirmed, that as to the owner of a vessel that spills oil, the lim-

---

[7] Opinion of the District Court, Appendix B, p. 15a.

[8] NSCSA did prove and obtain a judgment for collision damages in the amount of $19,300 under the general maritime law, not the State Water Control law. Opinion of the District Court, Appendix B, p. 49a.

itation provisions of OPA 90 must be exceeded by state law claims before state law remedies may be resorted to. The holding can only be interpreted to apply to state common law, since that was the only substantive state law being interpreted by the District Court when it issued this decision. To the extent NSCSA seeks to read the decision to apply to state statutory law, its argument must be rejected.

It is for this reason that the decisions cited by the Petitioner are inapposite. The *Ballard Shipping*[9] case involved interpretation of a Rhode Island pollution statute providing for recovery of economic losses *prior* to the passage of OPA 90. While the court spoke in broad terms about OPA 90 and common law, the case involved neither. Rather, the legal issue before the court was whether a judicially created doctrine in the general maritime law, the "Robins Drydock rule", preempted remedial state legislation for oil pollution damages. By contrast, the present case involves a federal statute, state common law, and no preemption holding.

Likewise, the *Askew*[10] and *Huron Portland Cement*[11] cases predated OPA 90 and involved application of specific state legislation – not common law. The *Intertanko*[12] and *Berman*[13] cases again applied state legislation and did not consider issues of common law. None

---

[9] *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623 (1st Cir. 1994).

[10] *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

[11] *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

[12] *Intertanko v. Lowry*, 947 F. Supp. 1484 (W.D. Wa. 1996).

[13] *Berman Enterprises, Inc. v. Jorling*, 793 F. Supp. 408 (E.D.N.Y. 1992), *aff'd*, 3 F.3d 602 (2d Cir. 1993), *cert. denied*, 510 U.S. 1073 (1994).

of the cases arose under the unique facts of the present case – where the claimant who was strictly liable for the pollution expenses it incurred (which expenses were less than its OPA limitation cap) is seeking to impose liability on a third party that exceeds that party's OPA limitation cap. Moreover, it seeks to accomplish this by applying state common law in a maritime collision action filed within the federal court's admiralty jurisdiction.

II.
THE DECISION BELOW HAS NOT GENERATED CONFUSION AMONG SHIPOWNERS OR THE COURTS.

Petitioner argues that this decision has led to confusion over responsibility for pollution cleanup and that it is important to clear up this issue as soon as possible.[14] To add urgency Petitioner recites the number of barrels of oil imported daily and the number of ship docking calls by oil tankers – both of which are absolutely irrelevant. Not only was the M/V SAUDI DIRIYAH not a tanker, but there has not been a major oil spill involving negligent tugs in a ship docking operation in recent memory. None of the incidents recited in Petitioner's brief involved a ship docking casualty. The high number of annual dockings without pollution incidents is, if anything at all, a reason *not* to have concern.

Not only has there been no evidence of confusion regarding cleanup responsibility, no evidence has been

---

[14] Petition p. 9.

cited of legal confusion either. Nearly two years have elapsed since the District Court decision in this case, and it has yet to be cited in a reported decision except for its ruling on prejudgment interest.[15]

This case is better characterized as having an absence of precedential value rather than creating the "confusion" that the petitioner laments is pervasive. Page 1 of Petitioner's brief contains a telling recital of the *unpublished* orders and decisions from which relief is sought in this case:

1. Order of August 14, 1995 dismissing the Virginia State Water Control Act cause of action;
2. Order of August 18, 1995 denying Motion for Reconsideration;
3. Order of May 29, 1996 denying Motion for Reconsideration;
4. Opinion of the Fourth Circuit dated September 9, 1997;
5. Order of October 6, 1997 denying rehearing and rehearing *in banc*.

Most notably, the per curiam opinion of the Fourth Circuit specifies on its face that it is both unpublished ("Affirmed by opinion ordered not published.") and may not be cited as precedent ("Such opinions are not binding precedent in this circuit"). These statements have been deleted from the Appendix copy attached to the Petition at page 1a. A faithfully reproduced copy of the caption of the slip opinion is attached in the appendix to this brief. Appendix B, p. A-3.

---

[15] *Cement Division, Nat'l Gypsum Co. v. City of Milwaukee*, 950 F. Supp. 904 (E.D. Wis. 1996).

More significant is the reality that *this* case could not influence the effectiveness and speed of a cleanup regardless of how it is decided. Besides being an unreported and non-precedential decision to this level, the facts of the case are narrow, do not have widespread application, and do not bear on the real incentives that drive and require immediate and complete response to a spill – onerous financial and criminal penalties. A failure to clean up a spill after being designated Responsible Party by the Coast Guard will result in loss of the right to limit liability.[16] In addition, owners or operators of craft which pollute are subject to civil penalties of $25,000 per day of violation.[17] And, if they fail to properly clean up the spill they may be subject to an additional civil penalty of $25,000 per day, or three times the cost incurred by the National Trust Fund.[18]

In order to insure that shipowners are able to respond to and pay for a spill, shipowners are required by OPA to provide Certificates of Financial Responsibility from the insurance groups or clubs that underwrite pollution liability for every inspected vessel that trades in the United States.[19] Moreover, vessel owners are required to have "Oil Spill Response Plans" in place to facilitate immediate response when a spill occurs.[20] These are both part of the comprehensive statutory scheme established through the passage of OPA 90.

---

[16] 33 U.S.C. §2704(c)(2).

[17] 33 U.S.C. §1321(b)(7).

[18] 33 U.S.C. §1321(e)(1).

[19] 33 C.F.R. §§130 *et seq.*

[20] 33 C.F.R. §§155.1010 *et seq.*

In short, vessel owners and managers will continue to react promptly to oil spills regardless of how liability and limitation are resolved in this particular case.

III.
OPA 90 IS A COMPREHENSIVE STATUTORY SCHEME WHICH WAS PROPERLY INTERPRETED BY THE LOWER COURTS.

A. OPA 90 Is a Comprehensive Scheme for Oil Pollution Damages.

In enacting OPA 90, Congress established a comprehensive scheme for determining oil pollution liability under federal law, motivated primarily by the perceived deficiencies in the then-existing patchwork of statutes and maritime law.[21] By expressly preempting the Limitation of Liability Act of 1851 for oil pollution liability, and providing that liability under OPA was established "notwithstanding any other provision or rule of law...," 33 U.S.C. §2702(a) (1994), Congress intended that OPA would be a comprehensive, coherent, and uniform approach to federal liability for oil pollution. The legislative history is replete with references to the preeminent position OPA was intended to serve in eliminating the patchwork of federal rules on oil pollution:

> It is important to note that following enactment of this Act, liablity and compensation for petroleum oil pollution damages caused by a discharge from a vessel or facility will be determined in accordance with this Act.

S. Rep. No. 94, 101st Cong., 2d Sess., *reprinted in* 1990 U.S. Code Cong. & Admin. News 746.

---

[21] Before OPA, five different federal statutes dealt with oil pollution liability and compensation. Congress found all to be inadequate. S. Rep. No. 94, 101st Cong., 2d Sess. 3, *reprinted in* 1990 U.S. Code Cong. & Admin. News 722, 724.

> Liability under this Act is established notwithstanding any other provision or rule of the law. This means that the liability provisions of this Act would govern compensation for removal costs and damages notwithstanding any limitations under existing statutes such as the Act of March 3, 1851 (46 U.S.C. §183 (1994 and Supp. 1996)), or under existing requirements that physical damage to the proprietary interest of the claimant be shown.

H.R. Conf. Rep. No. 653, 101st Cong., 2d Sess., *reprinted in* 1990 U.S. Code Cong. & Admin. News 781.

Thus, it is clear that, in increasing the limits of liability over the existing FWPCA provisions, expanding the scope of statutory claims to include private parties as well as the United States, and providing for a statutory fund to compensate injured parties, Congress intended OPA 90 to be *the* federal remedy for oil pollution damages.

The effect that such comprehensive legislation has upon the general maritime law and other causes of action is illustrated by *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d 609 (4th Cir. 1979), dealing with similar provisions in OPA's predecessor, the Federal Water Pollution Control Act (FWPCA). Section 311(f) of the FWPCA (33 U.S.C. §1321(f)) provided that "the . . . owner or operator of any vessel from which oil or a hazardous substance is discharged . . . shall, *notwithstanding any other provision of law,* be liable to the United States Government for the actual costs incurred . . . in removal of the oil." (emphasis supplied)

In *Steuart Transportation,* the United States claimed entitlement to response costs under the FWPCA, maritime tort, common law nuisance, and the Rivers and Harbors Act of 1899 (33 U.S.C. §407 (1994)). The Fourth Circuit held that FWPCA §311(f) was the United

States' exclusive cause of action for recovery of those response costs.

Other courts have followed similar reasoning. *See In re Oswego Barge Corp.*, 664 F.2d 327, 340, *reh'g denied*, 673 F.2d 47 (2d Cir. 1981); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 738 (5th Cir. 1980); *Frederick E. Bouchard, Inc. v. United States*, 483 F. Supp. 477 (D. Mass. 1984).

Congress provided in OPA an even more comprehensive scheme for oil pollution liability than existed in the FWPCA. OPA expanded the definition of statutory damage and response costs, and made the cause of action to recover them available to both governmental and private party claimants.[22]

Significantly, OPA 90 also provides a comprehensive scheme for third party liability, which was missing from FWPCA. The pre-existing FWPCA §311(g) (33 U.S.C. §1321(g)) allowed only the United States to pursue a statutory right of recovery for response costs against third parties. Private parties were left to general maritime law claims against third parties, preserved under 33 U.S.C. §1321(h)(1), because there was no statutory right of recovery provided to private parties.[23] However, OPA 90 expanded the scope of third parties' statutory liability and limitation of liability over that provided in FWPCA §311. First, 33 U.S.C. §2702(d) (1994) specifically provides for third party liability. Second, unlike FWPCA §311, statutory actions for response

---

[22] *Compare* 33 U.S.C. §2702 (1994) with 33 U.S.C. §1321 (1994 and Supp. 1996).

[23] In fact, private parties had no statutory cause of action under FWPCA §311. OPA has given private parties the same comprehensive remedies as are available to the government.

costs against "sole fault" third parties under OPA are available to private parties as well as to the federal government. Finally, even for those third parties that are not sole fault third parties within the meaning of §2702(d)(1)(A), OPA 90 provides for a statutory contribution action against any other person who is liable or potentially liable under this Act or another law, and provides that the contribution action shall be brought in accordance with OPA's litigation, jurisdiction, and venue provision. 33 U.S.C. §2709 (1994).

In light of OPA 90's comprehensive scheme for all oil pollution claims, these same principles of statutory interpretation dictate that OPA 90 provides the sole basis under federal law for recovery of response costs and damages against *third parties,* as well as responsible parties. The detail and scope of these third party liability provisions in OPA 90 create a presumption that Congress intended OPA 90 to be the exclusive remedy against third parties for oil pollution that displaces any conflicting general maritime law theories of liability.[24]

---

[24] In *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990), the Supreme Court endorsed the concept of legislative preemption of general maritime law, stating:

> In this era, an admiralty court should look primarily to . . . legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies, consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.

B. Moran's Limit of Liability is $500,000 Under OPA 90.

Consistent with the intent to provide a comprehensive approach to liability, including third party liability, OPA 90 has specifically provided a limitation of liability for third parties whose acts cause or contribute to an oil spill. Section 2704(a) provides "the total liability of a responsible party *under section 2702 of this title* and *any removal costs*[25] incurred by, or on behalf of the responsible party, with respect to each incident shall not exceed . . . [the specified limitation amount]" (emphasis added). Section 2702(d)(2)(A) provides that a third party whose act or omission causing an oil pollution incident occurs in connection with the operation of a vessel is entitled to limit its liability to the amount provided in §2704 with respect to that vessel. At a displacement of 252 Gross Registered Tons, the HARRIET MORAN's limit of liability under §2704(a)(2) is $500,000.

C. OPA 90 Does Not Create State Common Law Remedies That Are Preempted by Federal Maritime Law in a Marine Collision Suit.

The District Court never reached the issue of whether common law causes of action are preempted by the general maritime law in a marine collision action, but had it done so, it would have denied NSCSA's common law claim on that basis. A collision matter is perhaps the

---

[25] Since OPA removal costs are included within §2702, the additional reference to "and any removal costs" clearly indicates that the limitation provisions of OPA were intended to be comprehensive, and include any removal costs even if not presented in an OPA claim. Otherwise the language would be mere surplusage.

clearest example of a case requiring application of the general maritime law within the court's admiralty jurisdiction.[26] Determination of liability is based upon duties imposed by the navigational rules of the road[27] and the doctrine of unseaworthiness, while a comparative negligence rule applies to apportion liability rather than the common law (Virginia) rule of contributory negligence. Moreover, under the general maritime law a vessel has *in rem* liability which NSCSA alleged in this case.[28]

It is well settled that federal district courts hearing cases within their admiralty jurisdiction will apply the general maritime law. *See Maryland Department of Natural Resources v. Kellum,* 51 F.3d 1220, 1224 (4th Cir. 1995); *Mullenix v. United States,* 984 F.2d 101, 104 (4th Cir. 1993); *Meaige v. Hartley Marine Corp.,* 925 F.2d 700, 702 (4th Cir. 1991), *cert. denied,* 501 U.S. 1217 (1991).

NSCSA complains that the District Court decision re-writes 33 U.S.C. § 2718(a)(2)[29] to deny the availability of common law remedies where two vessels are involved in a spill, and where damages do not exceed the OPA limitation fund of the spilling vessel. NSCSA's interpretation of §2718(a)(2) is essentially that, by this one phrase at the end of a subsection devoted to the relationship between OPA 90 and the Solid Waste Disposal

---

[26] *Foremost Insurance Co. v. Richardson,* 457 U.S. 668 (1982).

[27] The Inland Rules of the Road have been codified at 33 U.S.C. §§2001, *et seq.* 1994).

[28] Appendix A, p. A-1.

[29] For clarity, it should be noted that 33 U.S.C. §2718 (1994) is titled "Relationship to Other Law." As noted in the text, 33 U.S.C. §2751 (1994) is titled "Savings Provision."

Act (42 U.S.C. §§6901 *et seq.* (1994), Congress overruled the well-established principles of supremacy of the federal maritime law over state common law in admiralty cases, and "revived" the unfettered application of state common law to maritime oil spills. NSCSA's contention is illogical and inconsistent with other provisions of OPA 90.

First, it is appropriate to note that OPA 90 does not apply only to maritime cases. It applies equally to an oil spill from an onshore facility that reaches the navigable waters of the United States. State common law may well have some application in such non-admiralty case.

Second, NSCSA's contention is inconsistent with the plain language of OPA 90's "Savings Provision," 33 U.S.C. §2751(e)(1994) which states:

> (e) Admiralty and maritime law.
>
> Except as otherwise provided in this chapter, this chapter does not affect –
>
> (1) admiralty and maritime law; . . . .

Third, NSCSA's position is inconsistent with the limitation of liability scheme clearly and carefully crafted in OPA 90, including the limitation granted to third parties who may have caused a spill. *See* 33 U.S.C. §2704 (1994 and Supp. 1995), discussed *supra.* If NSCSA is free to recover under any common law theory, the limitation of liability provisions of OPA 90 are meaningless. It was on the basis of this analysis that the court in *Steuart Transportation, supra,* held the United States could not avoid the limitation provisions in the FWPCA by bringing suit under a common law nuisance theory.

Finally, NSCSA's interpretation is at odds with the legislative history of this section. The relevant words that yield the true intent of this section and relied upon

by the District Court are emphasized in the following Senate Report:

> The theory behind the [savings clause] is that the Federal statute is designed to provide basic protection for the environment and victims damaged by spills of oil. Any State wishing to impose a greater degree of protection *for its own resources and citizens* is entitled to do so.

(Opinion of District Court, Appendix B, p. 35a, *quoting* Senate Report) (emphasis added).

The premise of the District Court holding is that OPA 90 is designed to require all vessel operators, regardless of fault, to be fully financially responsible for oil spills from their vessels. These are the potential polluters. The beneficiaries of OPA 90 are the environment and citizens damaged by spills of oil. These are the potential victims. The savings provisions of OPA allow the states to further protect their *resources and citizens* – the "victims" – but are not intended to provide additional causes of actions to vessel operators whose rights and liabilities are carefully set out in OPA 90's comprehensive legislative scheme, including a cause of action for contribution between strictly and jointly liable parties.

In a case involving similar statutory remedial schemes under other environmental laws, the Supreme Court recently stated:

> As we explained in *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 14, (1981), where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize by

> implication additional judicial remedies for private citizens suing under" the statute. "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.*, at 14-15 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)).

Meghrig v. KFC Western, Inc., 516 U.S. 479 (1996).

These principles of statutory construction indicate that in this case as well, this Court should adhere to the clear scheme for third party liability, including its limitation of liability, provided in OPA 90.

CONCLUSION

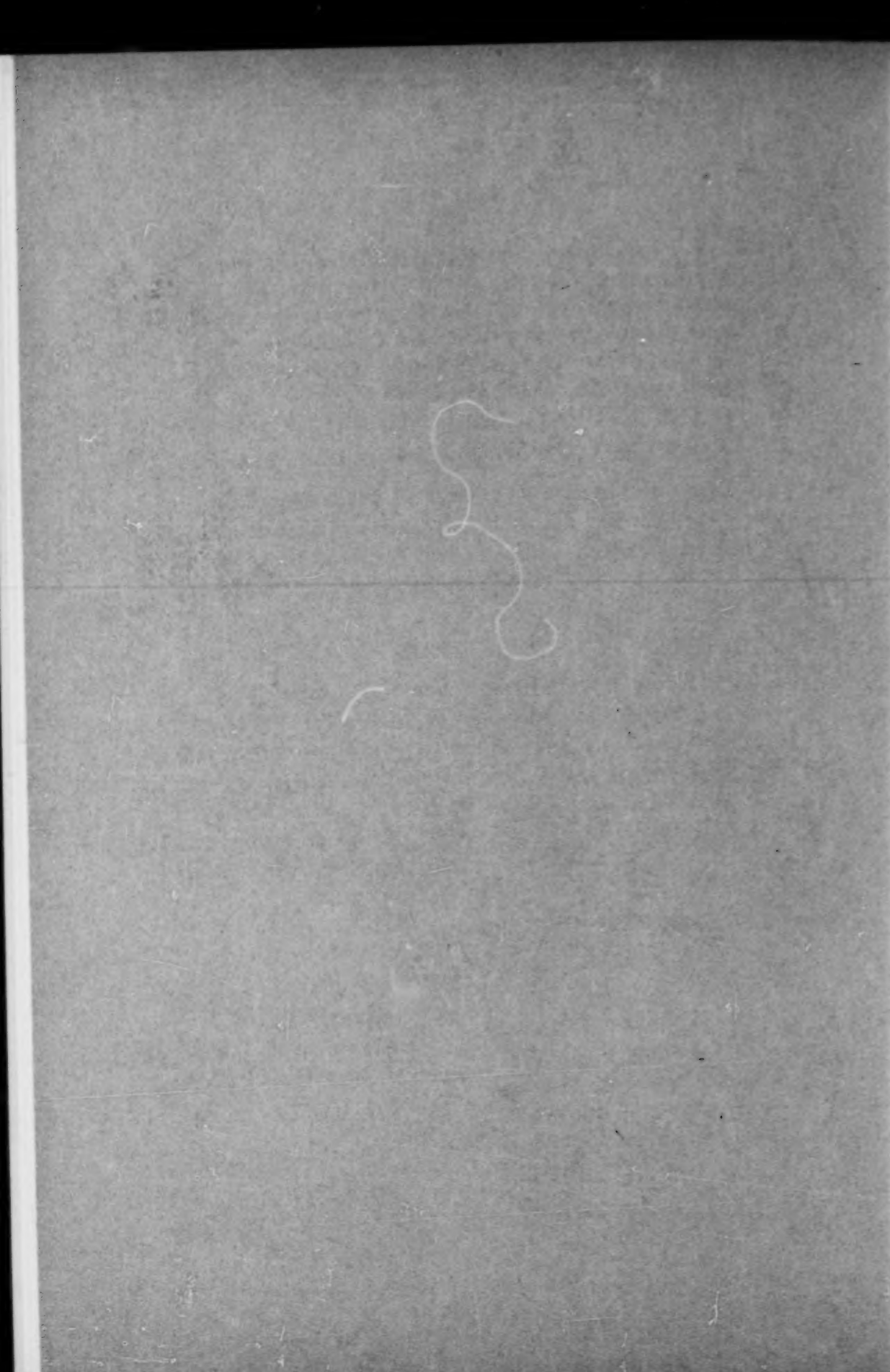
The District Court and Fourth Circuit correctly held that Moran is entitled to the OPA limit of liability and that Petitioner has no further avenue of relief in this case through state common law. There do not exist conflicts among the circuits or other characteristics of this case which would support a grant of a writ and the Petition should be denied.

Respectfully submitted,

MARK T. COBERLY
PATRICK A. GENZLER
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, Virginia 23510
(757) 446-8600

Attorneys for Respondents.

February 11, 1998



APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 2:95-CV-258

NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA (NSCSA),

Plaintiff,

v.

MORAN MID-ATLANTIC CORPORATION,
in personam,

and

MORAN TRADE CORPORATION OF DELAWARE,
in personam,

and

MORAN TOWING OF VIRGINIA, INC., a
Division of MORAN MID-ATLANTIC CORPORATION,
in personam,

and

M/V HARRIET MORAN,
her engines, tackle, apparel, etc., *in rem,*

Defendants.

SECOND AMENDED VERIFIED COMPLAINT

The Verified Complaint of National Shipping Company of Saudi Arabia ("NSCSA"), plaintiff, by counsel, as and for its Verified Complaint against Moran Mid-Atlantic Corporation ("Moran Mid-Atlantic"), *in personam*, and Moran Trade Corporation of Delaware ("Moran Delaware"), *in personam*, and Moran Towing of Virginia, Inc. ("Moran Towing"), *in personam*, and the M/V HARRIET MORAN, her engines, tackle, apparel, etc., *in rem*, defendants, allege, on information and belief, as follows:

JURISDICTION

1. This is an admiralty and maritime claim within the meaning of 28 U.S.C. §1333 and Rule 9(h) of the Federal Rules of Civil Procedure.

2. Jurisdiction and venue are also proper in accordance with the Oil Pollution Act of 1990, 33 U.S.C. §2701, *et seq.*

THE PARTIES

3. The plaintiff incorporates by reference paragraphs 3 through 11 of the Verified Complaint.

* * *

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-1741

NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA,

Plaintiff-Appellant,

v.

MORAN TRADE CORPORATION OF DELAWARE,
in personam; MORAN TOWING OF VIRGINIA,
INCORPORATED, a division of Moran
Mid-Atlantic Corporation,

Defendants-Appellees.

No. 96-1824

NATIONAL SHIPPING COMPANY
OF SAUDI ARABIA,

Plaintiff-Appellee,

v.

MORAN TRADE CORPORATION OF DELAWARE,
in personam; MORAN TOWING OF VIRGINIA,
INCORPORATED, a division of Moran
Mid-Atlantic Corporation,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Rebecca B. Smith, District Judge; J. Calvitt
Clarke, Jr., Senior District Judge; Tommy E. Miller,
Magistrate Judge,
(CA-95-258-2)

Argued: June 3, 1997

Decided: September 9, 1997

Before HALL and MICHAEL, Circuit Judges, and
TILLEY, United States District Judge for the
Middle District of North Carolina,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John R. Crumpler, Jr., KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellant, Mark Travis Coberly, VANDEVENTER, BLACK, MEREDITH & MARTIN, L.L.P., Norfolk, Virginia, for Appellees. ON BRIEF: Megan A. Burns, KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellant. Patrick A. Genzler, VANDEVENTER, BLACK, MEREDITH & MARTIN, L.L.P., Norfolk, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Plaintiff National Shipping Co. of Saudi Arabia (NSCSA) brought an action against defendants Moran Trade Corporation of Delaware, Moran Towing of Virginia, Moran Mid-Atlantic Corporation, and the M/V HARRIET MORAN (collectively "Moran") in an effort to recoup its expenses in the cleanup of an oil spill on the Elizabeth River outside Norfolk, Virginia. The district court determined that Moran was negligent and that this negligence was the sole cause of the spill. The court therefore found Moran liable for the costs of the cleanup under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §2701 *et seq.* However, the court limited Moran's liability under OPA to $500,000 (roughly half the cost of the cleanup). Finally, the court held that NSCSA could not recoup the excess costs through exceptions to the liability cap or through state law claims. NSCSA appeals from this limitation on Moran's liablity, and Moran cross-appeals from the court's determination that it was negligent. Finding no error, we affirm.

I.

This case involves an accident between a tugboat and a cargo vessel. The cargo vessel SAUDI DIRIYAH, owned by NSCSA, was docked at Norfolk International Terminals on the Elizabeth River. On the night of December 1, 1993, the vessel was to undock and move upstream to different docks. NSCSA contracted with Moran to provide two tugboats to assist in the move; it also contracted with docking pilot John Morey to oversee the move.

After breasting away from the pier, the SAUDI DIRIYAH made a series of turns to maneuver up the river. To

make these turns, the vessel used bow and stern thrusters that were mounted on the side. At some point during the turn, William Lusk, the captain of the tugboat HARRIET MORAN, brought the tug in on the SAUDI DIRIYAH's port quarter to assist with the turn into the channel. However, when the boats made contact, one of the tug's quarter bitts struck the SAUDI DIRIYAH's hull and opened a gash in the vessel's fuel oil tank. Oil began spilling into the river and continued to flow for the next two hours as the vessel moved upstream and docked.

Approximately 9,000 gallons of oil leaked into the river from the spill. The cleanup was directed by the United States Coast Guard, which designated NSCSA as the "responsible party" under the OPA. NSCSA thus arranged and paid for all of the cleanup. NSCSA paid roughly $870,000 to those engaged to remove the oil, and it also paid $106,806.12 to settle claims of those whose property was damaged by the spill. In addition, the Coast Guard and the United States Navy incurred about $300,000 in costs, which these agencies are seeking to recover from NSCSA.

NSCSA brought an action in the United States District Court for the Eastern District of Virginia, claiming that Moran's negligence was the cause of the spill. NSCSA brought claims under OPA, the Virginia Water Control Law, and state common law. The Water Control Law claim was dismissed before trial. After a bench trial the district court found that Moran was negligent and that this negligence was the sole cause of the accident. The court therefore granted relief under OPA, but it determined that OPA §1004(a)(2) capped Moran's damages at $500,000. The court also concluded that none of the exceptions to this cap applied and that NSCSA could not circumvent the cap through its state

law claims. However, under general maritime law the court awarded NSCSA $3,250 for the lost fuel and $16,050 for the damage to the hull. The court also awarded prejudgment interest. *See National Shipping Co. of Saudi Arabia (NSCSA) v. Moran Mid-Atlantic Corp.*, 924 F. Supp. 1436 (E.D. Va. 1996).

NSCSA appeals from the district court's denial of its claims for relief under state law and from the finding that none of the exceptions to OPA's damages cap applies. Moran appeals from the district court's conclusion that Moran's negligence caused the spill.

II.

We turn first to Moran's cross-appeal. Moran contends that the district court erred in holding it liable under OPA §1002 for the cleanup of the oil spill. Section 1002(a) establishes that the "responsible party" will be liable for the removal costs and damages of a spill. *See* 33 U.S.C. §2702(a). Under §1001(32)(A) the responsible party is defined as the owner or operator of the vessel which actually discharges the oil. Since NSCSA is the "responsible party" with regard to the SAUDI DIRIYAH, NSCSA was liable for the cleanup. Under §1002(d)(1), however, the responsible party can reassign liability to a third party if the responsible party "establishes that [the] discharge . . . and the resulting removal costs and damages were caused solely by an act or omission of one or more third parties." 33 U.S.C. §2702(d)(1). The district court found that Lusk, who as captain of the tug was serving as Moran's agent, acted negligently during the maneuver; the court further found that this negligence was the sole cause of the accident. Therefore, the court concluded that Moran was liable for the costs of the cleanup under §1002(d)(1). We

review the district court's factual findings only for clear error. *See Waters v. Gaston County*, 57 F.3d 422, 425 (4th Cir. 1995).

Moran contends that the accident was caused not by its negligence but rather by the negligence of Morey, the docking pilot hired by NSCSA. According to Moran, Morey failed to alert Lusk that the SAUDI DIRIYAH was changing the direction of its turn, and this failure to alert misdirected Lusk, causing him to approach the SAUDI DIRIYAH at the wrong spot. The district court, however, found that Lusk had failed to exercise proper control over his vessel during the course of the maneuver. *See NSCSA*, 924 F. Supp. at 1452. Having reviewed the evidence and the district court's findings, we do not believe that the district court clearly erred in finding that Moran was negligent.

III.

We next examine NSCSA's contentions that the district court erred in limiting Moran's liability under OPA's damage cap. Section 1002(d)(2)(A) of OPA states that "[i]f the act or omission of a third party that causes an incident occurs in connection with a vessel or facility owned or operated by the third party, the liability of the third party shall be subject to the limits provided in section 2704 of the title as applied with respect to the vessel or facility." 33 U.S.C. §2702(d)(2)(A). Section 1004(a)(2) puts the damages cap for any vessel other than a tank vessel at "$600 per gross ton or $500,000, whichever is greater." 33 U.S.C. §2704(a)(2). Since the tugboat weighed only 252 gross tons, the district court limited Moran's liability under OPA to $500,000. *See NSCSA*, 924 F. Supp. at 1447. NSCSA attempts to get

around this cap in two ways: it argues (a) that OPA's exceptions to the cap apply and (b) that it can recover the excess amount through state law claims under the Virginia Water Control Law and state common law. We take these arguments in turn.

A.

A party's liability may exceed the damages cap in OPA §1004(a) if it falls into one of the exceptions in §1004(c). The cap does not apply if the party committed "gross negligence or willful misconduct" or "violat[ed] . . . an applicable Federal Safety, construction, or operating regulation." 33 U.S.C. §2704(c)(1). NSCSA contends that Moran, through its agent Lusk, violated one of the applicable federal safety regulations, namely, the Inland Navigational Rule, That rule provides:

> Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

33 U.S.C. §2005. On the night of the accident, Lusk was acting as his own lookout. NSCSA contends that the absence of an additional designated lookout violated §2005. Whether a special lookout was necessary is a question of fact which we review for clear error. *See C.G. Willis, Inc. v. The Spica,* 6 F.3d 193, 196, 197-98 (4th Cir. 1993).

The district court made the following findings of fact in determining the lack of need for a separate lookout:

> On the night of December 1, 1993, the sky was clear and calm. . . . [Captain Lusk] testified that he had an almost complete view of his surroundings through the windows of his wheelhouse. The

> HARRIET MORAN was laying a short distance off the port quarter of M/V SAUDI DIRIYAH. Captain Lusk testified that he had the best possible view of the ship from the wheelhouse. It does not appear that a separate lookout would have been of much assistance to the Captain.

NSCSA, 924 F. Supp. at 1451. These findings of fact are not clearly erroneous.[1]

B.

NSCSA also claims that it can avoid OPA's damages cap by bringing claims under the Virginia Water Control Act and state common law. The Water Control Act provides that "[a]ny person discharging or causing or permitting a discharge of oil into or upon state water . . . shall be liable to [a]ny person for injury or damage to person or property, real or personal, loss of income, loss of the means of producing income, or loss of the use of the damaged property for recreational, commercial, industrial, agricultural or other reasonable uses, cause by such discharge." Va. Code. Ann. §62.1-44.34: 18(C)(4). NSCSA claims that this section enables it to recover its response costs under OPA as property dam-

---

[1] NSCSA argues that Lusk admitted the need for a lookout during his deposition. When asked "Did you have a lookout posted?", Lusk responded that "[t]he engineer at the time of the undocking would have been my lookout." J.A. 115. During his trial testimony, however, Lusk explained that the engineer "would have been [the lookout], if I inquired of him, requested him to be a lookout." J.A. 90. We do not interpret Lusk's deposition testimony as an admission of the need for a separate lookout.

NSCSA also contends that even if Lusk could have served as an adequate lookout on his own, he failed to do so on the night of the accident. However, NSCSA fails to present any evidence that would warrant such a conclusion.

age or economic losses. NSCSA also seeks to bring Virginia common law indemnity and subrogation claims in order to collect its OPA expenses. In essence, NSCSA wants to use state law to collect the costs that it incurred as the OPA "responsible party" in excess of the $500,000 liability cap.

We conclude, however, that OPA prevents NSCSA from using state law to collect damages under OPA that exceed OPA's liability cap. OPA §1004(a) specifically provides:

> Except as otherwise provided in this section, the total of the liability of a responsible party under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed [the limitations set forth therein].

33 U.S.C. §2704(a) (emphasis added). NSCSA is liable for the costs of the spill solely under OPA §1002, and Moran is liable for those costs solely under §1002. Thus, the total of Moran's exposure under OPA cannot exceed $500,000.[2] The only exceptions to this cap are those set forth in §1004 itself.

NSCSA claims that OPA does not limit NSCSA's ability to collect its excess liability under OPA through state law claims. It cites OPA §1018(a)(2), which states that "[n]othing in this chapter . . . shall . . . affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under . . . State law, including common law." 33 U.S.C. §2718(a)(2). NSCSA argues that this section allows it to bring state law claims to recoup its expenses. We disagree. NSCSA

---

[2] As we noted above, under §1002(d)(2) Moran is treated as a "responsible party" for purpose of the liability cap.

reads §1018(a)(2) too broadly; that section only protects the rights of parties to bring additional claims based on liability that accrues under state law. If NSCSA had itself been damaged by the oil, or if it had been successfully sued by others under state law for damages relating to the spill, then the OPA liability restrictions would not apply.[3] And in this case, NSCSA was not precluded by OPA from bringing a general maritime claim for the loss of fuel and the damage to the SAUDI DIRIYAH's hull. As the district court pointed out, however, "[s]tate law was never imposed to force NSCSA to cleanup the spill or to compensate its victims." *NSCSA*, 924 F. Supp. at 1449. Instead, "NSCSA's liability derived exclusively from OPA." *Id.*

If a responsible party could recoup its OPA liability costs through state law claims as well as through OPA, the cap imposed by OPA §1004(a) would be rendered

---

[3] The district court provided an example of such a case:

> Consider, for example, a case where an oil spill causes one million dollars of damage, but the responsible party's liability under OPA is limited to $500,000. If the spill occurred in Virginia, the responsible party may have to pay for the full cost of the spill despite the liability limitation contained in OPA because a person's liability under Virginia's State Water Control Law may be higher than its liability under OPA. . . . If the spill was caused by the negligence of a third party, as it was in this case, it is reasonable to assume that the responsible party may: (1) sue the third party for contribution under section 2709 of OPA; and (2) be subrogated to the rights of the state and of other claimants under the State Water Control Law. In this way, the responsible party, whose ultimate liability was not restrained by OPA, could recover the full cost of the spill from the third party despite any liability limitation the third party might enjoy under OPA.

NSCSA, 924 F. Supp. at 1449.

meaningless. Congress clearly intended for the cap to apply in situations like this one, since it established that "the liability of the third party shall be subject to the limits provided in section 2704 of the title." 33 U.S.C. §2702(d)(2)(A). Under OPA's limitations on liability, smaller vessels are subject to lesser liability. Even if we disagreed with this policy judgement, we are constrained by the text of the statute.

Because NSCSA seeks to recover costs imposed solely because of its liability under OPA, "the total of the liability [imposed on Moran] under section 2702 of this title and any removal costs incurred by, or on behalf of, the responsible party, with respect to each incident shall not exceed" OPA limits – for Moran, $500,000.[4]

IV.

Based on the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

---

[4] Because we affirm the limitation of Moran's OPA liabilities to $500,000, we need not discuss NSCSA's argument that the district court should have included the expenses incurred by Turnaboat Services Ltd. as part of NSCSA's expenses under OPA.